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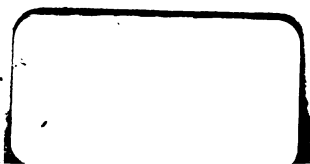
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VII





THE
HOUSE OF LORDS CASES

ON

APPEALS AND WRITS OF ERROR,
AND CLAIMS OF PEERAGE,

DURING THE SESSIONS

1864, 1865, AND 1866.

•
BY CHARLES CLARK, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

BY APPOINTMENT OF THE HOUSE OF LORDS.

•
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CASES

IN THE

HOUSE OF LORDS.

* GIPPS v. GIPPS.

1864. April 13; May 6, 27.

AUGUSTUS PEMBERTON GIPPS,	<i>Appellant.</i>
HELEN E. GIPPS,	}
W. WENTWORTH FITZWILLIAM HUME,	} <i>Respondents.</i>

Divorce. "Adultery." "Conniving." "Accessory." 20 & 21 Vict. c. 85. Covenant. Damages. New Trial. Practice.

The word "conniving," in the 29th section of the 20 & 21 Vict. c. 85, means not merely refusing to see an act of adultery, but also wilfully abstaining from taking any step to prevent adulterous intercourse, which, from what passes before the husband's eyes, he must reasonably expect will occur.

So if he takes money from the adulterer not to complain of the wrong, but to abandon his legal remedy for it, and then leaves the wife in a situation likely to occasion a renewal of the adulterous intercourse with the same person, he is "accessory" to it.

Therefore, where A. presented a petition for a divorce in respect of the wife's adultery with B., and received from B. a sum of money not to include in the petition a prayer for damages, and afterwards, on receiving a promise from B. to execute a bond to pay a further sum, offered no evidence in support of his petition, and allowed a verdict to be given for the respondent and co-respondent, and the petition to be dismissed, but made no provision for his wife, nor took any precaution to protect her against future intercourse with B., it was *Held*, that his conduct was such as to bring him within the words of the statute, so that his fresh petition in * respect of renewed acts of adultery, * 2 occurring after the compromise, was properly dismissed. (*Diss. Lord Wensleydale.*)

Quære. Whether the word "adultery" in the 31st section of the 20 & 21 Vict. c. 85, is confined to the adultery alleged in the petition for the dissolution of marriage. Per LORD WESTBURY, Lord Chancellor. — It is not, — so that if A.

has connived at the adultery of his wife with B., he cannot obtain a divorce on account of her adultery with C. (*Diss.* Lord Chelmsford.)

A husband cannot obtain a divorce in respect of an act of adultery committed with a particular person at one time, if at a previous time he has connived at her adultery with the same person.

Per LORD WENSLEYDALE and LORD CHELMSFORD. — To constitute connivance there must be a corrupt intention. The first arrangement in this case did not, in itself, amount to connivance, and did not bar the remedy in respect of a fresh act of adultery.

Per LORD CHELMSFORD. — Renewed adultery with the same person is not a fresh act of adultery, but merely further evidence of the adultery.

Per LORD WENSLEYDALE. — A covenant to pay damages to a petitioner for a divorce on the ground of adultery, is altogether void as contrary to the policy of the 20 & 21 Vict. c. 85, § 53.

Per LORD WENSLEYDALE. — Where, by consent, a jury has been dispensed with on the trial of a petition for a divorce, if a new trial should be ordered, the consent previously given would no longer be binding, and the petitioner might demand to have his case tried before a jury.

Timmings v. Timmings, 3 Hagg. Eccl. 76, 81, observed upon.

IN 1851 the appellant married Helen Etough Crookshank. Two children, daughters, were the issue of the marriage. The parties lived together till 1860, when differences having arisen between them, they separated. The appellant had the custody of the children. In that year the appellant was about to file a petition against the respondent and co-respondent, William Wentworth Fitzwilliam Hume, praying for damages and for a dissolution of the marriage, on the ground of adultery committed by the wife with him. The co-respondent was at that time earnestly anxious

* 3 to avoid publicity, and an interview * took place between the appellant's solicitor and a Mr. Hallewell, a friend of both parties, when it was proposed and agreed that a sum of 3000*l.* should be paid by Hume to Mr. Hallewell to abide the event, that it should be in lieu of costs and damages, and that the petition should not contain a claim for damages. The sum of 3000*l.* was accordingly paid by Hume, and no claim was made in the petition for damages as against him. After the petition had been filed, and the wife had put in an answer denying the adultery, on the 18th June, 1861, the cause stood for hearing before a jury. Certain correspondence had taken place between the solicitors for the respective parties, and on that 18th June, the appellant signed a paper (the conditions of which, as signed, were repeated in another paper given to the appellant on the same day by Mr. Ade,

the solicitor for the co-respondent Hume) consenting to withdraw his suit. The paper signed by Mr. Ade, on behalf of Hume, was in these terms: "In the matter of *Gipps v. Gipps and Hume*. In consideration of your having agreed to accept from the co-respondent the sum of 3000*l.* as your costs and damages, and upon the co-respondent agreeing to secure you the further sum of 4000*l.*, payable upon the death of his mother, and in the mean time paying you thereon, or as you may direct, interest at the rate of 5*l.* per cent. per annum, and you, with a full knowledge of all the circumstances, undertaking to withdraw your suit now about to be heard in the Divorce Court, I do hereby, as the solicitor acting for Mr. Hume, the co-respondent in this matter, undertake and agree on his behalf that he shall, within one month from the date hereof, execute such documents as may be necessary for securing you the payment of 4000*l.* and interest." The paper originally presented to the appellant had contained, * in addition, the words, * 4 "and to execute a deed of separation from my wife"; but these words the appellant rejected and struck out; they had also been written in the other paper, but were struck out before Mr. Ade signed it.

In consequence of this agreement, when the petition came on for hearing on the 20th June, 1861, the petitioner proposed to withdraw the record; this course was objected to, and the petition was called on; no evidence was offered in support of it, and the petition was dismissed. The co-respondent afterwards refused to sign and execute the bond for 4000*l.* on the ground that the money was not to be settled on the wife. A bill was filed in chancery for specific performance. Hume demurred to this bill. The cause was heard before Vice-Chancellor Wood, who, in November, 1861, allowed the demurrer.¹

In June, 1862, the appellant filed another petition in the Divorce Court, praying for a dissolution of the marriage, alleging as the ground for his prayer the fresh acts of adultery of the wife with the co-respondent from August, 1861, up to the date of the petition, and the birth of twins in May, 1862. The respondents put in answers denying the adultery. The cause was set down for hearing in Michaelmas Term, 1862; it was not then heard, and in December, 1862, Hume obtained leave to file an amended answer. This amended answer alleged connivance, wilful misconduct con-

¹ 2 Johns. & H. 517.

ducing to the adultery, and that before the adultery complained of in the second petition the appellant had filed a petition which he had agreed to withdraw on the payment of a sum of money ; that the money had been paid, and that when the aforesaid petition * 5 came on for hearing, the petitioner * had offered no evidence, and the petition had been dismissed. The appellant replied to this answer, denying connivance and misconduct, and alleging that the other averments were irrelevant, except so far as they might be admissible as evidence of connivance. The cause was, by consent, heard before the Judge Ordinary without a jury. Evidence was called,¹ and ultimately the Judge Ordinary pronounced an order declaring " that Helen Etough Gipps, the respondent, had committed adultery with William Wentworth Fitzwilliam Hume, the co-respondent ; but that Augustus Pemberton Gipps, the petitioner, had connived at such adultery," whereon the petition was dismissed.

This was an appeal against that order.

Sir H. Cairns and *Mr. Macaulay* (*Dr. Spinks* and *Mr. Hannen* were with them), for the appellant. — There is nothing in this case which warrants the decision of the Court below as founded on the true construction of the 29th, 30th, and 31st sections of * 6 20 & 21 Vict. c. 85,² * or which indicates that the husband

¹ See this evidence fully referred to in the judgment. The case in the Court below is reported, 3 Sw. & Tr. 116.

² Section 29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same ; and shall also inquire into any countercharge which has been made against the petitioner.

Section 30. In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has been, during the marriage, accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then, and in any of the said cases, the Court shall dismiss the said petition.

Section 31. In case the Court shall be satisfied, on the evidence, that the case of the petitioner has been proved, and shall not find that the petitioner has been, in any manner, accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is

connived at, still less that he was accessory to, the wife's adultery, either before or after the first petition. The adultery referred to in the statute must mean the particular adultery alleged as the foundation of the suit, and "accessory to" must mean actually promoting that adultery; it includes an affirmative proposition, and is not merely negative. When this petition was first presented, Hume was in dread of publicity. The appellant, for the sake of his two children, both of them girls, also desired to avoid it. He therefore consented to a compromise of the proceedings. Those proceedings related to a past adultery; but adultery has since been renewed, and this is a fresh petition in respect of that renewed adultery. What was done on that first petition cannot by possibility affect the appellant's right to sustain this new petition filed in respect of a new offence.

What are the principles which have hitherto governed the ecclesiastical Courts in matters of this kind? The latest case, which indeed reviews all the previous cases, is * that of *Phillips v. Phillips*,¹ where Dr. Lushington, speaking of connivance, quotes the observation of Sir W. Scott in *Moorsom v. Moorsom*,² that "the presumption of the law is against connivance, and if the facts can be accounted for without the supposition of intention, the Court will incline to that construction"; and referring to Sir J. Nicholl's remarks in *Rogers v. Rogers*³ on connivance, he says that they show the learned Judge to have meant that connivance must be that which was equivalent to "consent," as was shown by his having adopted Sir W. Scott's application of the words, "*volenti non fit injuria*." The same idea was also expressed by Sir W. Scott in *Forster v. Forster*.⁴ And in *Timmings v. Timmings*, Sir W. Scott

presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved: Provided that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

¹ 1 Rob. Eccl. 144, 3 Notes of Cas. 444, 481, 483, afterwards in the Arches and Privy Council, 4 Notes of Cas. 523, 5 Notes of Cas. 435.

² 3 Hagg. Eccl. 107.

³ 3 Hagg. Eccl. 57.

⁴ 1 Hagg. Cons. 146.

says: ¹ "A husband is not barred by mere permission of opportunity for adultery: * * * it is one thing to permit, and another to invite." In *Allen v. Allen* ² it was distinctly stated by Mr. Justice Hill, in summing up to the jury, that "in order to establish connivance by the husband, it must be shown that he gave a willing consent to the adultery. Mere negligence, inattention, dulness of apprehension, or indifference, will not suffice; there must be an intention on his part that she should commit adultery." So in *Marris v. Marris* ³ Sir C. Creswell himself said, that by connivance he understood the willing consent of the husband. And in *Glennie v. Glennie* ⁴ the same learned Judge expressly adopted *Phillips v. Phillips* and *Allen v. Allen*, and then said: "I think that to establish connivance it is requisite, not that the party conniving should be actually an accessory before the fact, so as to have taken any active measure to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to." In *Stone v. Stone* ⁵ Dr. Lushington said: "Facts to constitute connivance must have a direct and necessary tendency to cause adultery to be committed or continued." The principles thus stated, if applied to the facts of this case, show that there has been nothing like connivance here.

The Judge Ordinary thought the man who acted as this petitioner had done "must be taken to give a tacit assent to any future intercourse between her and her paramour." Why the facts themselves, especially the terms of the letters, expressly contradict such an inference. There was no "toleration of what had passed." If A. assaults B. and B. brings an action, and then puts an end to it because A. pays him 1000*l.* in lieu of damages, can B. be told that that is an assent to what has been done, still more, that it is a permission to assault him again? There is no pretence for saying that there is any *presumptio, juris et de jure*, that if you deal with an adulterer, instead of pursuing the extremest remedy against him, it is equivalent to an antecedent consent, and that all the consequences of an antecedent consent follow. [THE LORD CHANCELLOR. — What would the course have been under the old law?]

¹ 3 Hagg. Eccl. 81.

² 30 Law J. N. S. Prob. 4, 2 Sw. & Tr. 108 n.

³ 2 Sw. & Tr. 530, 543.

⁴ 32 Law J. N. S. Prob. 17.

⁵ 1 Rob. Eccl. 99, 101.

It is most highly improbable that this House would, on account of the withdrawal of the first petition, have refused the bill on the * second adultery, but if it had done so, that would have * 9 been in the exercise of an uncontrolled and irresponsible legislative discretion. That is not the case with a Court which is bound to follow, even in the exercise of its discretion, settled principles and rules of law and practice. [LORD CHELMSFORD. — Suppose the arrangement for the payment of the 3000*l.* made, and that Gipps performed his part, but Hume refused to perform his part of it, could there have been a fresh petition in respect of the former adultery ?] Certainly not. But that could not affect the subsequent adultery. [THE LORD CHANCELLOR. — There is no stipulation in the agreement itself as to the wife's future good conduct.] The absence of any formal stipulation of that sort cannot affect the matter. Without any such stipulation, she would forfeit all right to any provision by any subsequent act of adultery. In the very earliest conversations on the proposed arrangement, it was expressly stated that the allowance was to be only *quamdiu se bene gesserit*, and without any thing being said, such would have been the legal result.

There is no difference between the 3000*l.* and the 4000*l.* Both were to be paid in respect of the same cause of proceeding, that is, the adultery previous to the first petition. The authorities relied on in the Court below do not warrant the judgment. In *Lovering v. Lovering*,¹ the first adultery was with the apprentice, whom, nevertheless, the husband kept in the house and did not discharge. Under such circumstances, the subsequent adultery with another man was not allowed to give the husband a right to relief. In *Crewe v. Crewe*² where it was ultimately determined that there was no connivance, in delivering judgment, Sir W. Scott says,³ * “By toleration I mean that passive suffer- * 10 ance of adultery for a length of time, which, in law, enures to a waiver of legal remedy.” There is nothing of the kind in this case, where, on the contrary, the remedy was taken at as early a period as possible. Again, in *Hoar v. Hoar*,⁴ Sir W. Scott says, “It is not mere imprudence and error of judgment which the law deems connivance. Where a man takes a step for the best, which turns out otherwise, it is not such an error which is to

¹ 3 Hagg. Eccl. 85.

² 3 Hagg. Eccl. 133.

³ 3 Hagg. Eccl. 123.

⁴ 3 Hagg. Eccl. 137, 140.

be laid to his charge. * * * Conduct to bar must be directed by corrupt intention." So in *Moorsom v. Moorsom*,¹ already referred to as adopted by Dr. Lushington; and yet that was a case where the husband had long permitted an intimacy between his wife and a person of notoriously light character.

Then as to the agreement with relation to the 4000*l*. The decision of the Vice-Chancellor cannot affect the case. It may be assumed that a bargain of this sort, while *in fieri*, would not be enforced in equity, because it might interfere with the exercise of the power of the Divorce Court in apportioning the money for the benefit of the children, but not because it was a bargain contrary to law, or conducive to adultery, or amounting to connivance. The power of intervening for the benefit of the children, which of course the Vice-Chancellor desired not to interfere with, is altogether one of a novel kind, but till its creation, the law entirely, and without objection, permitted these bargains. As the law now stands, three courses are open to a husband, and he may take any one without reference to the other. He may sue for a dissolution of the marriage — or for a divorce *a mensa et thoro* with damages

— or for damages alone. Now a husband may well say, "I * 11 have two children, female children, * and it will be a great disadvantage to them to have the shame of their mother published to the world — it would be a great benefit to them to get what will furnish a provision for them without such a publication, and as to the asking for a dissolution of the marriage, though that would be a benefit to me, I may give it up in order to avoid the disadvantage to them, and to secure them the benefit." These are intelligible motives, and acting on them cannot form a just ground for disentitling the husband to a divorce when he finds he cannot secure for his children the benefit he intended for them. The husband here rejected all improper compromise. In the original draft of the arrangement were the words, "and to execute a deed of separation from your wife." The husband struck out these words, showing that he would not agree to any thing which the law did not require, or which might even appear to give a license to the misconduct of the wife or the co-respondent.

[THE LORD CHANCELLOR. — If the Court suspected the real circumstances, would it not have been bound to call on the Queen's

¹ 3 Hagg. Eccl. 87, 107.

Proctor to intervene?] No; for there is no pretence here to allege collusion.¹ [THE LORD CHANCELLOR. — Does not what was done here amount to a license? was she not abandoned to Hume? LORD CHELMSFORD. — The 3000*l.* and the 4000*l.* stand on a totally different footing.] There was nothing like license here. The letter announcing the willingness to listen to an arrangement contained the words “to be continued during her good conduct”; and access to the children is only promised with the restriction as to her good behaviour. At no time was there any thought of abandoning her to Hume. [They referred to many passages in the letters of * the appellant’s solicitor in support * 12 of this observation, and especially relied on one containing these words: “Mr. Gipps will decline all negotiation, or to make her any allowance at all, or to permit access to the children, until he can have a complete assurance that all connection with Mr. Hume is broken off.”] And during all this time the appellant had believed that she was living under the care and in the house of her mother.

Then as to the legal effect of the settlement of the first suit. In *Walker v. Walker*,² where, after the husband had been living in open adultery for thirty years, and the wife had taken no notice of it, she finally brought a suit for divorce, Sir J. Nicholl dismissed the petition, but at the conclusion of his judgment said,³ “If the husband continues to live in adultery, I do not know but that the wife may have a remedy by a fresh suit — the condonation would be taken off.” In *Dunn v. Dunn*,⁴ Sir John Nicholl dismissed the petition for a divorce in respect of a second adultery, on account of what he deemed the extraordinary weakness of the husband in taking back the wife after the first adultery, and acting towards her as a husband; but that decision, on going before the Arches, was reversed.⁵

The Judge here has determined the case on suspicion. If he suspected any thing which the evidence before him did not show,

¹ See *Lantour v. The Queen’s Proctor*, ante, vol. 10, p. 685.

² 2 Phillim. 153.

³ 2 Phillim. 157.

⁴ 2 Phillim. 403.

⁵ 3 Phillim. 6. Sanchez says, *De Matr. lib.* 10, disp. 5, § 20: “*Id tamen observandum est, si reconciliatione facta, conjux ille reconciliatus in adulterium relabatur, posse, non obstante priori illa reconciliatione, de novo eo adulterio illum accusari, et ratione illius celebrari divortium.*”

he should have called on the husband to submit to examination. If the case is defective for the want of that knowledge, which might be thus obtained, it ought to be sent again to the

*13 Court below. Except it * should be so considered defective, the petitioner is entitled to the divorce; the adultery has been established beyond all dispute, and there is no ground whatever for saying that it has been connived at, or condoned by the husband.

The respondent and co-respondent did not appear in person, or by counsel.

May 27.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this case appears to me to depend partly upon the construction of the 31st section of the Act of 20 & 21 Vict. c. 85, by which the Court of Divorce was established, and partly on the question, what is the proper legal description or effect of the acts and conduct of the petitioner?

In framing the 31st section of the Divorce Act, the Legislature appears to have been desirous of recognising and giving effect to the general principle that a husband shall not be entitled to a divorce if he has been guilty of any neglect or misconduct which has conduced to the adultery of the wife.

The word “adultery” in this section is not to be confined to the particular acts of adultery, or to the particular adulterous intercourse alleged or proved by a petitioner for dissolution of marriage. If a husband is proved to have connived at the adultery of his wife with A., he cannot obtain a dissolution of marriage on account of her adultery with B.; nor if he has connived at adultery committed by his wife with a particular person at one time, can he complain of adultery committed with the same person at a subsequent time.

It would be contrary to the spirit of the Act, and highly prejudicial to public morality, if any other interpretation
*14 * were adopted. It would be a disgrace to the law to suppose that a husband may connive at the adultery of his wife on Monday, and yet be at liberty to complain of a repetition of the adultery on the Tuesday.

The next question is, what are the legal force and effect of the words in the section “conniving at the adultery”? The word

“conniving” is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur. Still more must “conniving at” include the case of a husband who, having discovered the adultery of the wife, takes a sum of money from the adulterer upon an engagement not to complain of the acts of the wife, but to abandon his legal remedy, and then leaves the wife in such a situation as cannot but facilitate the continuance or renewal of the adulterous intercourse.

Let us now see what has been the conduct of the petitioner. In the year 1860 the petitioner discovered that an adulterous intercourse existed between his wife and the respondent Hume. He determined to take proceedings in the Divorce Court for the dissolution of his marriage. But, before the petition was presented, an agreement was come to as between the husband and the adulterer, that the latter should pay, and the former accept, the sum of 3000*l.* as compensation, and that the intended petition should be presented, praying a dissolution of the marriage, but without any prayer for costs or damages against the adulterer. Accordingly the sum of 3000*l.* was paid by the adulterer to the husband, and * the petitioner presented his petition against his wife, * 15 praying for a dissolution of the marriage. On the day on which the petition was appointed to be heard by the Court of Divorce a further proposition was made, and, after some treaty, a memorandum of agreement was signed by the husband and the adulterer, which was in the following words [see *ante*, p. 3].

After this agreement had been concluded the petition came on to be heard, and the petitioner not having given any evidence in support of his charges, a verdict was given in favour of the respondent, his wife, and the petition was dismissed.

In making this agreement, I consider the co-respondent as acting on behalf of the wife. His own indemnity had been purchased from the petitioner by the payment of 3000*l.* What remained was the petitioner's complaint against his wife, and his claim to a divorce on the ground of her adultery, and these are given up and released by the petitioner in consideration of the agreement to pay

him 4000*l.* For that sum he sold his right to complain of his wife's infidelity.

He did not condone the offence by taking his wife back to live with him again. The law is very charitable, and seems to give much encouragement to meek condonation. I do not say if the offence had been *bond fide* condoned by the husband that he would have lost his right to complain of a subsequent renewal of the adulterous intercourse. That, however, was not the case; but, on the contrary, as soon as the agreement for the money is signed, the legal remedy is given up, and so far as the husband is concerned, the wife is abandoned to the adulterer.

For some time previous to the agreement of the 18th June, *16 the petitioner and his wife had been living *separate and apart from each other. The children of their marriage resided with, and were under the care of, the petitioner, their father. The wife, therefore, was alone. The petitioner has given no evidence as to the place of her residence at the very time when the agreement was made. For aught that appears, the adulterer may have come from the arms of the wife to conclude the agreement with the husband, and then returned to them again. There is no proof that the petitioner made any stipulation as to her residence or future conduct. She was left at liberty to go wherever she pleased. No care or anxiety was shown by her husband to separate her from Mr. Hume, or to stipulate for a severance of the connection.

Accordingly the adulterous intercourse appears to have been immediately renewed, if it was ever interrupted. In the beginning of August, 1861, Mrs. Gipps and Mr. Hume are found cohabiting together at a hotel at Dorking. They afterwards went to France and Switzerland, and the intercourse seems from the evidence to have continued without interruption. Mrs. Gipps was confined of twins in the month of May, 1862. The conduct of her husband in the mean time is extremely significant. Whilst he believed that the agreement to pay the 4000*l.* would be fulfilled, or was capable of being enforced, he does not appear to have taken any care to watch or ascertain the conduct of his wife; but in consequence of some refusal or delay in the payment of the 4000*l.*, the petitioner, in the month of August, 1861, filed a bill in the Court of Chancery to enforce the performance of the agreement of the 18th June, 1861. Mr. Hume demurred to the bill, and the demurrer

was allowed by the Vice-Chancellor Sir W. P. Wood on the 15th of November, 1861.

After the demurrer was filed, and as appears from the *evidence of Mr. Evans, the appellant's solicitor, a detective * 17 officer was employed by the appellant at the end of October, 1861, to watch the movements of his wife. And he appears to have quickly obtained, if he did not already possess, abundant evidence of the continuance of the old adulterous intercourse. The times and places are specified in the particulars of demand, as they are called, delivered by the appellant. These, together with the evidence of Amelia Haddon, and of Amelia Frances, lady's maid to Mrs. Gipps, show how completely the wife was left at liberty, and how she availed herself of that liberty to continue her intercourse with Mr. Hume.

After the failure of the appellant's Chancery suit, and before presenting his present petition, some letters passed between the solicitors of the several parties; the appellant requiring the payment of the 4000*l.* to himself, Mr. Hume offering to pay it on the death of his mother, and in the mean time to allow Mrs. Gipps 200*l.* a year. I am obliged to arrive at the conclusion, that if the 4000*l.* had been paid, the present petition would not have been presented. It was, however, presented in June, 1862; and was, in my judgment, most properly dismissed by the Judge Ordinary.

I have but one more observation to make on the circumstances of this painful case. It was asserted by the appellant's counsel at the bar (although I find no evidence to support it), that at the date of the agreement of the 18th of June, 1861, the petitioner believed that his wife was, and would continue, under the care of her mother. The only evidence as to any inquiry by the petitioner on that subject, is in the evidence of Mr. Evans, his solicitor; he says, "I have asked White" (White was one of the solicitors of Mrs. Gipps) — "I have asked White where she was *soon after the end of first suit; he never told me. I pre- * 18 sume I told Mr. Gipps." But if the appellant knew, or had reason to believe that his wife was residing with her mother, I have now the painful duty of bringing out of the appellant's own case what was the nature of that residence, and what was the character of that care. The appellant, Mr. Gipps, has produced a number of letters by his wife, and amongst them there is one, plainly written anterior to the commencement of the first suit, and

plainly in his possession prior to the agreement. It is a letter from the respondent, Mrs. Gipps, to her mother, Mrs. Taynton. "Dearest Mamma, — Pemberton has intercepted my letter to you, enclosing one for Mr. Hume. I shall be round in Dover Street in as short a time as I am able ; as I cannot go in there, will you get a lodging ? I am very ill."

The material part of the letter to the mother, which the wife describes her husband as having intercepted, is this : "I wish you would send to me ; it is so much safer. I cannot trust P." (the initial of the appellant's Christian name, "Pemberton"). "Sist. is the only one I can, and I cannot well be without her. How dreadfully cold it is ! I am obliged to enclose *his*" (which appears to have been underlined) "without even a cover, for I am watched — so will you explain, and do it for me ?" The pronoun "his" plainly meant a letter to Mr. Hume ; and accordingly it is produced by the appellant ; it is dated like the other, "Tuesday." Now it will be seen here that the adulteress sent this letter without a cover to her mother, to be forwarded to Mr. Hume, the adulterer. And if this be proved, this is the person in whose care, we were told at the bar, the appellant left his wife, and properly left her.

The open letter that the adulteress sent to her mother

*19 * as an enclosure, is in these words : "My own dearest, I only write you a few lines in answer to your letters received yesterday ; the one written from Mr. N——, the other from M. F. Do not worry about me ; I shall soon be all right, and I am much better. I cannot help being irritable at not seeing you, but when I *can*, I shall soon be myself again. Do think and arrange with mamma about some mode of getting me away from here." She appeals to the co-respondent to arrange with her own mother about some mode "of getting me away from here. — P. G." (that is, the husband) "says I *shall not* go ; of course I know, if I choose to go, I can, but then it makes him my enemy ; at least I suppose it would." She then refers to her medical man, and she adds at the end these words, "How I wish we were all off out of the way. He is so happy and delighted at seeing me so powerless, that no one would feel inclined to pity him. I will write again to-day, after receiving the letter you have written to me through mamma. God bless you, dearest. Your poor little pet, Helen."

The mother lived at the time of the agreement in Somers Place,

near Hyde Park Square, and the particulars of the alleged adultery, given by the petitioner himself, are these: He charges "that at divers times, between the 1st day of September, 1861, and the 1st of October following, the co-respondent visited respondent at No. 4, Somers Place, Hyde Park, in the petition named"; that Somers Place, thus named as the place of intrigue and adultery, was the house of the mother.

I think, if this be true (I earnestly hope it may not be true, but it is the case made by the appellant), a more painful scene of profligacy was hardly ever presented in a Court of justice.

I think it right to advert for a moment to the decisions * that have taken place in the Ecclesiastical Court upon the * 20 subject of connivance. In one of them, *Timmings v. Timmings*,¹ which is the only one that could be appealed to by the appellant, Sir William Scott is reported to have used the following words:—

"True it is that a husband is not barred by a mere permission of opportunity for adultery; nor is it every degree of an inattention on his part which will deprive him of relief; but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of the wife take its full scope." My Lords, I cannot believe that these words were uttered by the learned Judge, because they are wholly inconsistent with the tenour of the rest of his judgment. But as they are attributed to him in this report, I think it right to say that, so far as my judgment extends, that is not the law, and that it would be a disgrace to the law if it were so. If a husband knowing the tendency and the evil habit of the wife, misled by this expression, let "the licentiousness of the wife take its full scope," without reproof or interference, I hold that he would never obtain any remedy in a Court of justice. My Lords, in subsequent cases a very different rule is represented to have been declared by Sir W. Scott. In the case of *Lovering v. Lovering*,² Sir William Scott refers to the case of a husband who was charged with connivance, and he says, "There is one circumstance here which distinguishes this husband's conduct from proper condonation, and marks an improper consent. If he were induced to forgive his wife, yet when he sees an indecent familiarity with his own apprentice, would he suffer the man to remain one moment in his house? This is impossible to * reconcile with * 21

¹ 3 Hagg. Eccl. 81.

² 3 Hagg. Eccl. 86.

a due care of his own honour. If he had pardoned his wife after 1790, and discharged his servant, there would have been nothing in the condonation. The act of his permitting him to continue in his house after he knew of great and indecent familiarities, and till she is guilty with another, amounts almost to consent, and is a degree of delinquency which renders him unworthy of a remedy as far as that man is concerned." He then says, in the latter part of the judgment, "The Ecclesiastical Court requires two things: that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife; and if he has relaxed with one man, he has no right to complain of another."

My Lords, the same language is used in a subsequent case of *Moorsom* and *Moorsom*,¹ in which the same learned Judge says, "It is not necessary to prove connivance to actual adultery, any more than it is necessary on the other side to prove an actual and specific fact of adultery. If a system of connivance at the improper familiarity, almost amounting to proximate acts, be established, I shall infer a corrupt intention as to the result, and shall not call for more direct proof."

And in a subsequent case of *Gilpin v. Gilpin*,² which was decided by Sir William Wynne, the language of that learned Judge is this: "Connivance is the word used. It has been argued that it must be such as to show knowledge of, and privity to, the actual commission of adultery, but that is not so. If there has been such extreme negligence to the conduct of his wife, such an encouragement of acquaintance and familiar intimacy as was likely to lead to the consequence that ensued — an adulterous intercourse —

*22 *it would subject him deservedly to a refusal of the sentence he prayed."

Now, ordinarily speaking, there is difficulty in proving connivance, because in ordinary cases the fact of adultery has not been established, but in the present case the petitioner knew the fact of the adultery; and, according to his own statement (though I trust it is not true), he knew that that adultery had taken place with the sanction (if I may use such a word) of the mother, as an accessory thereto. What had happened he knew was likely to happen again — he left his wife (taking the price of his dishonour, as we have heard at the bar) in the hands of the mother. He

¹ 3 Hagg. Eccl. 95.

² 3 Hagg. Eccl. 150.

left her, therefore, in a situation in which that was likely to occur which, according to his own statement, actually did occur, namely, that the wife did continue that adultery at the house of her mother, and with her consent.

My Lords, I hope that your Lordships will have no hesitation as to this case. I should be extremely sorry if the law was left in such a state as to admit a doubt upon the subject; for if ever there be a Court in which it is incumbent to hold up the maxim that a man who seeks relief shall come with clean hands, it is undoubtedly the Court of Divorce; and I hope that your Lordships will carry out the spirit of the Act of Parliament, and that you will not in any manner in the slightest degree detract from the construction which has been put upon it in the Court of Divorce.

LORD WENSLEYDALE.—My Lords, the question for your Lordships in this case is not whether if this were an application to you in your legislative capacity to pass a bill for a divorce, as under the old system, there are circumstances belonging * to it of such a character as might induce you to hesitate in * 23 acceding to it. Upon that question I offer no opinion. But the question now is simply whether, according to the law now established by the statutes allowing divorce, the appellant is or is not entitled, as a matter of right upon the facts proved, to a divorce from his wife, or at least to a further inquiry before it is refused.

The law of divorce is now entirely regulated by the new Acts of Parliament, the 20 & 21 Vict. c. 85, and subsequent statutes on the same subject, to which latter it is unnecessary to refer; and by the 29th, 30th, and 31st sections of the first-mentioned Act, the Court is bound to pronounce a decree of dissolution of the marriage, upon certain conditions mentioned particularly in the Act.

These are the conditions. That the Court is to be satisfied as far as it reasonably can, that the adultery has been proved, and that the petitioner has not been in any manner accessory to, or conniving at, the adultery, and that he has not condoned the same. These are the only material parts of the Act to which it is necessary to advert as applicable to this case.

Of the fact of the adultery being committed, which is the sub-

ject of this suit, there is no question. That the appellant was accessory to that adultery in the sense in which that word seems to be used in the Act of Parliament, being more than connivance, that he was a party substantially aiding and assisting, is equally out of the question; that he has condoned it, in the proper sense of the word, is also out of the question.

The only matter to be inquired into and decided is, whether he connived at the adultery, the subject of the suit, for which the petition was presented.

The late lamented and eminent Judge of the Divorce * 24 * Court, Sir C. Cresswell, was of opinion, as expressed in his judgment, for the reasons there given at length, that he had connived at the adultery, the subject of this suit, committed in August, 1861.

After hearing the argument at your Lordships' bar, I have satisfied myself that the learned Judge's reasons for the opinion he has given are insufficient, and that he has come to a wrong conclusion. He proceeds entirely upon what had occurred on the settlement of a former suit of the petitioner for a divorce, for the adultery of his wife with Mr. Hume, the co-respondent in a first suit, as well as the second, now under appeal. And from the mode of settlement of that suit by compromise, the learned Judge drew the inference of connivance by the appellant in the adultery, the subject of complaint in this. I think that inference was unwarranted.

The circumstances are these. [His Lordship stated them.] For the 4000*l.* agreed to be paid as the price of the giving up the suit, and allowing the acquittal of the co-respondent, the appellant filed a bill; but Vice-Chancellor Wood held very properly that the bill could not be sustained, because it was clearly against the policy of the Act, which, whilst it allows damages to be recovered by the 38*d* section, gives the Court the power to direct in what manner they shall be paid and applied, and the payment to the petitioner himself absolutely, entirely disappoints that arrangement, and puts the money into the hands of the petitioner, and therefore, no doubt, the covenant is altogether void as against the policy of the law.

But still the claim is made for redress for an injury done, — for a compensation of that injury, — to which the petitioner claims to be justly entitled, and which is paid as a compensation for * 25 that injury, and does not in the * least imply the petition-

er's consent to its commission. That the petitioner stipulated illegally for an additional compensation to be paid to him, for consenting that the charge should not be published. By assenting to a public acquittal does not the less show the payment of the 3000*l.* to be payment of damages and costs; and the not subjecting that payment to the discretion of the Court cannot make the payment any thing but a compensation for a wrong done, — a wrong which was inexcusable, and for which compensation was justly due.

To put this on the footing of adultery committed with the actual consent of the husband, or by his tacit assent, implied by connivance, by wilfully shutting his eyes to what he must have known beforehand, before it was about to be done, or after it was done, by taking no notice of it, is in my judgment an error. And it is on that principle the judgment proceeds.

Connivance excuses on the principle of *volenti non fit injuria*. To constitute it there must be corrupt intention, as laid down upon full consideration of the authorities in the case of *Phillips v. Phillips*,¹ in the Court of Arches, A. D. 1847, which was acted upon by Sir Cresswell Cresswell in the case of *Glennie v. Glennie and Bowles*,² when he said, that to prove connivance it is necessary to show not only that the husband acted in such a manner as that adultery might result; but also it must be proved that it was his intention that adultery should result.

If the petitioner really had consented to the first adultery with Hume, or connived at it, in the true sense of the word, it is quite unnecessary to dispute the proposition that he could not complain of a fresh adultery with the * same man, or with * 26 another, as laid down by Lord Stowell, and confirmed by Sir C. Cresswell in this case.

My objection to Sir C. Cresswell's judgment is, that there has been no consent to the first adultery, and no connivance in the proper sense of the word, by insisting on and receiving compensation for an admitted wrong. This compensation was paid in an irregular and unauthorised manner; but still its nature is not altered; it is still nothing but a payment of damages for a past injury, wholly inexcusable.

That the plaintiff made no stipulation at the time of the settlement for the good conduct of his wife, seems to me to be of no weight. It cannot be supposed that he should make such a bar-

¹ 1 Rob. Eccl. 144. See ante, p. 7, n. (d). ² 32 Law J. Prob. M. & A. 17.

gain with the adulterer. There is some evidence that in an attempted settlement with his wife, for her maintenance, he did.

I proceed entirely upon this, that there is no proof of any thing like connivance in this legal sense, by his insisting, as he was entitled to, to a compensation for an injury undoubtedly committed, though not a compensation in an authorised mode.

There are certainly some circumstances in the subsequent conduct of the petitioner in looking after his wife, which may require some consideration. He appointed a detective to discover her conduct. He may have relaxed his efforts whilst he was waiting for Vice-Chancellor Wood's decision on the demurrer to his bill to recover the 4000*l*. These circumstances were not considered or acted upon by the Judge Ordinary, and may require further investigation. But I think justice requires that we should not form our judgment upon the very imperfect materials which are before us; and that as the judgment of Sir C. Cresswell ought, in my opinion, to be set aside, we ought to act on the authority

* 27. given by the * 56th section of the Act, and remit the case to the Court for further inquiry.

The parties have consented to the Court trying the original suit itself, without the aid of a jury; but a doubt may be entertained whether, in the new trial, the appellant may not have a right to insist, under the 28th section, to have the disputed facts tried by a jury. And that consideration induces me the more to advise your Lordships that a new trial may be ordered.

LORD CHELMSFORD. — My Lords, the question upon which the propriety of the decree appealed from depends, is, whether the appellant was in any manner accessory to, or conniving at, the adultery complained of in his petition. The learned Judge Ordinary thought, from the circumstances connected with his former petition for a divorce, in which he claimed damages from the same person who was the co-respondent to the petition in question, that the petitioner "must be taken to have given a tacit consent to any future intercourse between her and her paramour"; and he dismissed the petition on the ground that the petitioner had connived at the adultery.

I agree with my noble and learned friend Lord Wensleydale, that the learned Judge Ordinary was in error in holding that the compromise of the first petition amounted in itself to connivance.

at (what is called) the subsequent adultery. Connivance is a figurative expression, meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, and is inapplicable to any thing past or future. If a husband, ignorant at the time of his wife's infidelity, afterwards discovers it, and leaves it unnoticed and unpunished, whatever may be the motive of his silence, * even if it be the base and sordid one of *28 making a profit out of his dishonour, he cannot be said to connive at the past adultery, much less at any future intercourse of the guilty parties.

But although the learned Judge Ordinary may have been wrong in his description of the character of the compromise as a connivance, yet I think it constituted ample ground for the dismissal of the petition. I quite agree in the observation made by Sir Hugh Cairns, that the adultery mentioned in the 29th and 31st sections of the Act 20 & 21 Vict. c. 85, means the particular adultery which is the foundation of the petition. But it seems to me to be incorrect to call the criminal intercourse of the wife with her former paramour, after the agreement upon which the former petition was abandoned, such adultery as in the contemplation of the Act could be the subject of a second petition for a divorce. It must be borne in mind that the offence of adultery is complete in a single instance of guilty connection with a married woman. It is the first act which constitutes the crime, and though the adulterous intercourse between the parties should continue for years, there is not a fresh adultery upon every repetition of the guilty acts, although all and each of them may furnish proof of the adultery itself.

The inference which I draw from this view of the subject is, that if a husband having the right to divorce his wife for adultery, abandons that right in consideration of a sum of money received from the adulterer, he can never afterwards be a petitioner for a divorce on the ground of his wife's criminal intercourse with the same person. A husband who so deals with the man who has dishonoured him, must be taken to have consented to his own shame, so far as ratification amounts to consent. And the principle upon which Lord Stowell's judgment * proceeded in the *29 cases which have been cited, applies, and debars him ever after from using any future criminal intercourse as the ground of another petition for a divorce.

It is unnecessary to enter into the consideration of any nice questions which might arise out of cases of condonation after a compromise like that in the present case, or to express any opinion as to the right of a husband to complain of the adultery of his wife with another man, after such a bargain made to silence his complaint of prior adultery. I confine myself entirely to the case before me, and say that a husband who sells his right to obtain a separation from a guilty wife, to the man who is the partner of her guilt, can never afterwards be heard to renew his application for a divorce on the ground of criminal intercourse with the same individual; which is not, strictly speaking, fresh adultery, but merely further evidence of the adultery which had been consummated when the bargain was made to purchase a disgraceful silence.

But even if this general view of the character and effect of the compromise should be questionable, there appears to me to be ample evidence in the circumstances of this case to justify the dismissal of the petition on the ground that the appellant was either accessory to, or that he connived at, the adultery of which he complains.

I do not understand the word "accessory" in the Act in the legal sense of "one who counsels or commands another to commit an offence, or who conceals the offender." But from the words "in any manner" coupled with it, it seems to be used in its popular sense of "aiding in producing, or contributing to produce, some effect." If this is a correct view of the meaning of

* 30 * the Legislature in the use of this word, I should feel no difficulty in holding that a husband who sells to the adulterer his right to complain of his wife's adultery, and afterwards discards her, without providing her with any means of living, or taking any precaution to protect her against any future intercourse with the adulterer, must be considered as an accessory to the renewal of that intercourse in the sense of contributing to produce the effect.

But I think that, looking to all the circumstances connected with and following upon the compromise, there is strong evidence to warrant the conclusion that the appellant connived at the subsequent adultery. After the arrangement of the former suit, the sole object of the appellant was to obtain the bond for 4000*l.*, the consideration for his relinquishing his right to obtain a divorce.

For this purpose, after the suit was ended by a verdict by consent, which negatived the adultery, negotiations were carried on as to the allowance to be made to the appellant's wife, and as to the mode in which the 4000*l.* to be secured by the bond should be settled. In the course of these negotiations, the appellant certainly stipulated that the proposed allowance to his wife should continue only during her good conduct. But as no such stipulation entered into the arrangement of the original suit, the learned Judge Ordinary seems to have been justified in the fear which he expressed that "it was intended rather for the protection of the appellant's purse, than as a security for his wife's future good behaviour." Upon the disagreement of the parties as to the manner in which the 4000*l.* should be settled, the appellant, in August, 1861, filed a bill against Mr. Hume, for specific performance of his agreement to give the bond; to which bill there was a demurrer. Pending the suit in Chancery, * the appellant, * 31 in October, 1861, employed a detective to discover where and in what manner his wife was living; and obtained information which must have satisfied him that the intercourse between her and Mr. Hume still continued. From the subsequent conduct of the appellant, it is not unfair to assume that this employment of the officer was not with a view of protecting his wife against the contamination of Mr. Hume's further intercourse, but to obtain information which might be used as the means of influencing the pending negotiations. For what was his conduct after this discovery? Did he instantly reject the idea of receiving the stipulated price of his previous dishonour, and break off at once all further communication with the adulterer? Without the slightest remonstrance or even allusion to the fact, he calmly continues the negotiations as to the 4000*l.* leaving no doubt on my mind that if they had led to a satisfactory result, his feelings as to his wife's misconduct would have been suppressed, and the second suit in the Divorce Court would never have been heard of. But having failed to come to terms with the man who was hindering the return of his wife to that good conduct which he professed to have so much at heart, he still clung to the hope of obtaining the stipulated satisfaction for his former dishonour through his suit in Chancery, until it was ultimately determined against him. Under these circumstances, I cannot hesitate to believe that the appellant, knowing that the intercourse between his wife and Mr.

Hume was going on, took no notice of it as long as it suited his purpose to forbear, and that he thereby connived at the adultery upon which his second petition was founded.

Agreeing, therefore, in the conclusion of the learned
 * 32 * Judge Ordinary, though differing with his reasons, I think that his decree ought to be affirmed.

Decree affirmed, and appeal dismissed.

Lords' Journals, 27th May, 1864.

PORTLAND v. TOPHAM.

1864. April 6, 7.

The DUKE OF PORTLAND and others, *Appellants*.
 LADY MARY E. TOPHAM and others, *Respondents*.

Power. Appointment. Understood Reservation. Appointee, Concurrence of, implied, but not expressed.

A power to be validly executed must be executed without any indirect object.

The donee of the power must give the property, which is the subject of it, as property, to the person to whom he affects to give it.

A. created a power to appoint a fund between two of his daughters, H. and M., or to appoint it to one, in exclusion of the other, and subject to such restrictions, &c. as the donee of the power (A.'s son) might think fit. The donee of the power executed a deed of appointment, which in form gave the whole of the fund to one of the sisters, H., but it was understood between the parties that H. was only to receive one moiety of the fund for her own use, and that she was to allow the other to accumulate, subject to some future arrangement, and in pursuance of this understanding H. gave her brokers directions to invest, in the name of the donee of the power, of another brother, and of herself, one half of the fund, and the interest thereon, to accumulate : —

Held, that this was, in equity, a fraudulent execution of the power, and that the deed of appointment was wholly void.

The power authorised the donee to execute an appointment with or without a power of revocation and new appointment. The deed of appointment did not reserve the right of revocation. The Lords while affirming the decree of the Court below, which declared the deed of appointment void, introduced into the order the words "without prejudice to any question as to any future

exercise of the power of appointment," but refused to express any opinion whether any such future exercise of the power could be permitted.

THIS was an appeal against certain orders of the Lords Justices.

* The late Duke of Portland married on 4th August, 1795, * 33 a daughter of Major-General Scott, and on that marriage a settlement was executed by which, among other things, certain English estates of the Duke were charged with a sum of 40,000*l.* for the younger children of the marriage, in such shares and proportions as the Duke and Duchess or the survivor should appoint, and in default of appointment, among the younger children equally. A similar charge, with nearly similar powers of appointment, was created on the Scotch estates of the Duchess. On the 8th June, 1814, a deed, with similar provisions, was executed, and was confirmed by a private Act of Parliament. There were nine children of the marriage. The eldest son died in 1824 unmarried, and the present appellant, now Duke of Portland, became then, as eldest surviving son, Marquis of Tichfield. Lady Caroline Bentinck, one of the daughters, died in 1827. There were then seven children living, and on the marriage in that year of Lady Charlotte with Mr. Denison, one seventh of the 40,000*l.* charged on the English estates was appointed to be raised for her use, and was, in fact, paid in cash by the Duke, he taking an assignment of the seventh to himself as part of his personal estate. The same course was followed with respect to Lady Charlotte's seventh share of the 40,000*l.* charged on the Scotch estates. On the marriage of Lady Lucy, in 1828, to Lord Howard de Walden, the same course was pursued, as to the charges on both the estates, in her favour.

Early in the year 1843, it came to the knowledge of the Duke that his youngest daughter, Lady Mary Bentinck, had entertained proposals of marriage from Colonel (now Sir William) Topham. His Grace did not think fit to approve of the match, and strongly expressed * his opinion, threatening that he would, * 34 so far as he had the power, leave away every thing from Lady Mary. Her Ladyship promised not to marry in the Duke's lifetime.

On the 24th June, 1843, an indenture was executed between the Duke of Portland of the first part, the then Marquis of Tichfield (now Duke of Portland, and appellant), Lord George Bentinck,

and Lord Henry Bentinck, of the other part, by which the Duke covenanted with the Marquis, Lord George, and Lord Henry, to transfer a sum of 52,000*l.* three per cent. consols, into their names; and it was declared that the Marquis, Lord George, and Lord Henry should stand possessed of the said sum of 52,000*l.* upon trust, to invest the dividends during the life of the Duke, and after his decease the said trust fund and all accumulations should be held by them on trust for Lady Harriet Bentinck and Lady Mary Bentinck (the two surviving unmarried daughters), or for one of them exclusively, if the other should be living at the time of the appointment theroinafter mentioned (or the issue, &c.), in such parts, shares, and proportions, and for and with such limitations in favour of one or more of them, and either by way of legacy, portion, present or remote interest, or otherwise, and to vest and be payable, &c. at such time or times, age or ages, and upon such contingencies, and under and subject to such directions and regulations for maintenance, education, and advancement, and such conditions and restrictions as the Duke during his life, or, after his decease, the person who during the lives of the said Lady Harriet and Lady Mary, or the survivor of them, should be Duke of Portland, from time to time, by any deed, &c. should appoint.

And in default of and until such appointment upon trust,
 * 35 during the joint lives of Lady Harriet and Lady Mary, * to pay the dividends to them as tenants in common for their respective absolute use and benefit; and after the decease of either, to pay the whole of the dividends to the survivor for life; and after the decease of the survivor, the trust fund and dividends were to go to such person as should then be Duke of Portland. In fact, 50,000*l.* of this sum had been invested on mortgage; the rest was invested in the three and a quarter per cent. consols.

By an indenture of 29th June, 1843, between the Duchess of the first part, the late Duke of the second part, the then Marquis of Tichfield (the now Duke and appellant) and Lord George Bentinck of the third part, three sums of stock, amounting to 23,343*l.*, three and a half per cent. consols, and a sum of 9000*l.*, due on a bond of the Duke, all of which were stated to be subject to the disposition of the Duchess, were assigned to the then Marquis of Tichfield and Lord George as trustees, in trust to pay the dividends and interest to the Duchess for her life, and after her death to set apart so much of the trust fund as, at 3*l.* per cent., would

realize 800*l.* per annum on the trusts thereafter declared, and subject thereto absolutely to Lord Henry, or if he should die in the lifetime of the Duchess, to Lord George Bentinck absolutely ; and as to the fund so set apart to produce the 800*l.* per annum, to be held upon trust during the life of Lady Mary Bentinck, and provided the Duke during his life, or, after his decease, the person who should for the time being, during the life of Lady Mary, be Duke of Portland, by any deed, &c., either with or without power of revocation and new appointment, &c., should so direct or appoint, but not otherwise, to pay an annual sum not exceeding 800*l.* out of the dividends for the benefit of Lady Mary for life, in such manner, &c. as should be expressed in such appointment, * and subject to such trust and power to stand possessed of * 36 the same for Lord Henry, and in case he should die during the life of the Duchess, for Lord George.

The Duchess of Portland died in 1844, on which event a part of the principal sum was paid to Lord Henry absolutely, and the rest, producing 800*l.* a year, continued invested as a trust fund. The sum of 800*l.* arising from this trust fund had been regularly received by Lord Henry, but not for his own use, nor had he paid it over to Lady Mary, but his bankers, under his order, dated September, 1844, had regularly invested it in the purchase of consols. By a memorandum of that date, he acknowledged that he was possessed of the fund " during the life of my sister, Lady Mary, in trust for her, as my father, or the Duke of Portland for the time being, may direct. In case of no such direction, the investments are to belong to me absolutely."

Lord George Bentinck died early in the autumn of 1848. His death reduced the number of younger children of the Duke then living to five. Of these Lady Harriet and Lady Mary were unmarried. The Duke then desired to divide the two sums of 40,000*l.* equally among them. He proposed to give a sum of 2666*l.* 13*s.* 4*d.* between his two married daughters, which would bring their respective shares charged on the two estates, to 16,000*l.* each, and then to divide the remaining 24,000*l.* into three parts, one to be given to Lady Harriet, one to Lord Henry for himself, and one to him in trust, subject to any appointment of the Duke of Portland for the time being, as expressed in the deed of 29th June, 1843.

Two deeds poll, of the 13th and 28th October, 1848 (the latter

relating to the Scotch estates), were, in pursuance of this intention, executed by the Duke, reciting the facts already stated, and
 • 37 appointing 8000*l.* to be * raised immediately after his death to be paid to Lady Harriet as her fifth share of the sum of 40,000*l.*, and appointing to Lord Henry the sum of 16,000*l.*, being two other fifth parts of the said sum.

Only one moiety of the sum appointed to Lord Henry was in fact paid to him absolutely, the other was paid to him on trust, and Lord Henry signed an order directing Messrs. Drummonds, his bankers, to invest this moiety in the names of the Marquis of Tichfield and of Mr. Ellis, and to place the dividends in their joint names to an account "M.," which it was by the bill alleged meant the initial letter of Lady Mary's name. Messrs. Drummonds executed this order, and invested the 16,000*l.* (formed of the two sums of 8000*l.* charged severally on the English and Scotch estates) in the purchase of 18,686*l.* three and a quarter per cents., in the names of the Marquis and Mr. Ellis.

By an indenture of the 24th November, 1848, between Lord Henry Bentinck of the one part, and the Marquis of Tichfield and Mr. Ellis of the other part, after reciting that Lord Henry had invested the sum of 16,000*l.* in the purchase of 18,686*l.* three per cents., in the names of the Marquis and Mr. Ellis, with the intent (from the natural love and affection which Lord Henry had for his sister, Lady Mary) that a provision should be made for her upon such contingency as was thereafter expressed, he directed the Marquis and Mr. Ellis to stand possessed of the same (which they agreed to), upon the following trusts: From the expiration of twenty-one years from the day of the decease of Lord Henry, or till (previously thereto) such appointment should be made as would entitle Lady Mary to the transfer of the whole of the stocks, &c., or until she should die previously to the appointment of the whole to her, that the Marquis and Mr. Ellis should receive
 • 38 the * dividends on the 18,686*l.*, and the dividends on the investments thereof to form an accumulating fund; and upon further trust at the expiration of the accumulation, or at any time previously, on the direction of the Duke of Portland for the time being, to pay all or any part, &c., for the benefit of Lady Mary, in such manner as the Duke of Portland for the time being should direct, and if no direction, for the benefit of Lord Henry absolutely.

By another indenture of the 24th November, 1848, between the Duke of the first part, the then Marquis of Tichfield, and Lord Henry Bentinck of the second part, and Charles Heaton Ellis of the third part, the Duke limited all his Marylebone estates to Mr. Ellis upon trust (among other things), to raise certain annuities of 1250*l.* for different members of the family, and after the death of the Duke to raise a clear annuity of 2720*l.* during the joint lives of Lady Harriet and Lady Mary, and pay the same unto the Marquis of Tichfield and Lord Henry and the survivor by quarterly payments, and to the intent that the said Marquis and Lord Henry should pay the said annuity of 2720*l.* unto Lady Harriet and Lady Mary, or unto either of them in exclusion of the other, in such parts and subject to such conditions or restrictions as the said Marquis during his life, or, after his decease, Lord Henry, or, after his decease, the personal representative of the survivor of them, should from time to time, by deed, direct or appoint, and in default of such appointment, to pay the annuity between Lady Harriet and Lady Mary in equal proportions.

The Duke of Portland died 27th March, 1854, and the Marquis of Tichfield thereon succeeded to the dukedom, and afterwards gave up any claim he might have had, originally, as a younger child, to a share in the charges in favour * of the * 39 younger children. He determined to carry into effect the wishes of his father as to Lady Mary. For this purpose he consulted Mr. C. Heaton Ellis, who, in a letter dated 22d June, 1854, noticing difficulties raised by the legal advisers of the Duke, suggested the appointment of all the dividends and interest of the 52,000*l.* to Lady Harriet, remarking that "no bargain or arrangement should be made with her beforehand, lest the appointment be vitiated. I dare say it will occur to her Ladyship afterwards, or it can prudently be suggested to her, that one half of the interest and dividends, and one half of the annuity, as it is paid, should be laid out to accumulate, as she would not like, in the present state of things, to benefit personally beyond her own moiety." There was a great deal of correspondence to the same effect. At that time the fund consisted of 50,000*l.* on mortgage, and 21,844*l.* three and a half per cents. A direct and absolute appointment to Lady Harriet was not, however, then adopted, and it was proposed to make from time to time provisional appointments of the dividends of these sums. These were made in

two particular instances by deeds dated on the 21st September, 1854.

After the appointments of 21st September, 1854, the annuity and the income of the fund, subject to the trusts in the deed of 24th June, 1843, were paid to Messrs. Drummond to the account of the Duke and Lord Henry as trustees, and then carried over in pursuance of their order to an account in their names marked "Account S.," (sister's account.) They were then transferred from that account to the account of Lady Harriet, and one moiety was under her order invested, the other moiety was applied to her own use. Mr. Ellis had prepared this order by direction of * 40 the Duke, and Lady Harriet signed it at * Mr. Ellis's request.

The order was in the following terms : —

" 18th October, 1854.

" MESSRS. DRUMMOND, — Please to invest one half the payments in future to be made to my credit from the joint account of the Duke of Portland and Lord Henry Bentinck (marked 'S,') in the purchase of three per cent. consols, in the names of the Duke of Portland, Lord Henry Bentinck, and myself.

" HARRIET M. BENTINCK."

On the 5th October, 1854, Lady Mary Elizabeth Bentinck married Colonel Topham. On the marriage a settlement was executed securing to her during life and to her appointees afterwards, the exclusive benefit of the property to which she was or might be entitled.

On the 19th December, 1854, the Duke of Portland (the appellant) executed a deed poll reciting the marriage of his sister, and declaring that in pursuance of the power in that behalf contained in the deed of the 24th June, 1843, he appointed that, until further or other appointment, &c., and subject thereto, all the dividends to accrue during the life of Lady Harriet on the said sum of 52,000*l.* and the accumulations, should be paid and belong to Lady Harriet. And power was reserved to the Duke of Portland for the time being to revoke the appointment thereinbefore contained, and to declare such other trusts of the dividends, &c., during the lives of Lady Harriet and of Lady Mary, or of the survivor of them, as he should from time to time think fit.

By another deed poll of the same date, with the same recitals,

the Duke appointed the whole of the annuity of 2720*l.*, during the joint lives of Lady Harriet and Lady * Mary, to be *41 paid to Lady Harriet exclusively until further appointment, and subject thereto, and power was reserved to the Duke, or after his death to Lord Henry, and after the death of the survivor to his personal representative, wholly or partially to revoke this appointment, and to make such other as he should think fit.

On the 13th July, 1860, Lady Mary E. Topham filed her bill (afterwards amended and re-amended) against the Duke of Portland, C. Heaton Ellis, Lord Henry C. Bentinck, Lady Harriet Bentinck, and others, which, after setting forth the above facts, prayed, first, that the plaintiff might be declared entitled to the sums of 18,686*l.* consols, purchased with the said sums of 8000*l.* and 8000*l.*, appointed to Lord Henry Bentinck by the deeds poll of the 13th and 28th October, 1848, and the accumulations thereon, or that the appointments made by the said deeds might be declared void as against the plaintiff, so far as the same related to those two sums, and that the settlement thereof might be declared void as against her, and that the same might be set aside, and that suitable directions might be given. And secondly, that so much of the fund standing in the names of the Duke of Portland and Mr. Ellis, as trustees of the settlement of the 24th November, 1848, as had arisen from the income of the two sums of 8000*l.*, might be paid to the plaintiff, and the residue transferred to her trustees under her settlement. Thirdly, that she might be declared entitled to one moiety of the income of the fund, subject to the trusts of the indenture of the 24th June, 1843, and one moiety of the annuity of 2720*l.*, appointed by the deeds poll of September and December, 1854, to Lady Harriet, and the accumulations thereon; and that it might be declared that the appointments made by the said deeds poll were void as against the plaintiff, and that she was * entitled to one moiety of the income accrued due on the *42 fund since the death of the late Duke of Portland, subject to the trusts of the indenture of June, 1843, and to one moiety of the annuity of 2720*l.* (after deducting certain necessary credits) comprised in the indenture of November, 1848; and that a receiver might be appointed, and accounts directed.

Answers were put in and evidence taken, and a great many letters passing to and from the late and the present Duke, and Mr. C. H. Ellis, and other documents of a like kind were read. These

letters were relied on as showing the intentions of the parties in executing the deeds of 1843, 1848, and 1854, the difficulties that had been found in the way of carrying these intentions into effect by legal forms, the scheme (without formal communication of the purpose) to put Lady Mary's share under the control of Lord Henry, or of Lady Harriet, by giving either or both an apparent absolute interest in the fund, on a private understanding that Lady Mary's share of the funds that should be accumulated during the life of Lady Mary's husband, to be then disposed of as it was known that the late Duke had desired.

In her answer to the plaintiff's bill, Lady Harriet declared that it was not till she saw the bill that she was informed of the legal effect of the deeds of December, 1854; she believed that under the deeds of 1843 she had become absolutely entitled for life, for her own use, to a moiety of the dividends of the 52,000*l.*, and of the annuity of 2720*l.*; she did not know that she had any beneficial right in respect of the other moiety. She knew that her father desired that, in the event of Lady Mary marrying Sir W. Topham, she should not derive any benefit from any settlement

made by the Duke, but this was better known to the present *43 Duke and Lord Henry than *to herself. Since the date of the deeds of 1854, the whole of the dividends of the 52,000*l.* and the accumulations, and the whole of the annuity of 2720*l.*, had been paid to the two defendants, the Duke and Lord Henry, and by them passed to her account with Messrs. Drummond. One moiety thereof had been applied by her to her own use, the other moiety had been invested under her order, in the joint names of the Duke, Lord Henry, and herself. This order had been given by her, on the suggestion of C. H. Ellis, who, she believed, made the suggestion with the privity or sanction of the Duke. She never before claimed this other moiety, but she now submitted that the whole had been validly appointed to herself.

The cause was heard before the Master of the Rolls on the 23d April, 1862, and on the 22d July he pronounced an order declaring that the appointments made by the deeds poll of the 13th and 28th October, 1848, were void, so far as the same related to the two sums of 16,000*l.* respectively appointed to Lord Henry, and that the indentures of the 24th November, 1848, were void, and that according to the true construction of the settlement of 1795, such younger children of the late Duke and Duchess only as sur-

vived their parents became entitled to such part of the 40,000*l.* as was unappointed, and that the plaintiff became entitled, on the 27th March, 1854, the day of the death of the Duke of Portland, to the sum of 8000*l.*, part of the sum of 16,000*l.* expressed to be appointed by the deed poll of the 13th October, 1848, and to 8000*l.*, part of the sum of 16,000*l.* appointed by the deed poll of the 28th October, 1848; and it appearing that one moiety of those two sums was invested on the 31st October, 1848, in the purchase of 18,626*l.* stock, in the names of the Duke of *Portland *44 and C. H. Ellis, and that the dividends thereon had been accumulated up to the time of this decree, it was declared that the legal personal representative of the late Duke, was entitled to the dividends which accrued on that stock, from the 31st October, 1848, to the 27th March, 1854, and the accumulations thereof. And it was ordered that the now Duke and C. H. Ellis should, within six weeks, pay or transfer to such legal representative such dividends; and that the Duke and C. H. Ellis should transfer to Lady Mary's trustee, under her settlement, such a portion of the 18,686*l.* as on the 27th March, 1854, was of the value of 12,000*l.*, and pay to her, on her separate receipt, the dividends due on the same, from 27th March, 1854, and the accumulations thereof. And costs were given, and the trustee of Lady Mary was to hold the rest for the purposes of her settlement; and as to the other matters, the plaintiff's bill was dismissed.¹

On the 7th November, 1862, Lady Mary presented a petition of appeal against this partial dismissal of her bill. The Duke of Portland, Lord Henry and Lady Harriet Bentinck, appealed against the other parts of the decree.

The petitions of appeal came on before the Lords Justices, who made an order dated 2d May, 1863, directing that the decree made by the Master of the Rolls should be discharged; and it was by the said order declared that the deed poll of the 13th October, 1848, was void, so far as related to the sum of 8000*l.* part of the sum of 16,000*l.* thereby appointed to Lord Henry Bentinck, and that the sum of 8000*l.* was distributable under the trusts of the indenture of the 4th August, 1795, and the 8th June, 1814, as in default of appointment, and that Lady Mary was entitled, on the 27th March, 1854, to the sum of *2666*l.* 13*s.* 4*d.*, being one-third *45 part of the sum of 8000*l.*; and that the deed of the 24th

¹ 31 Beav. 525.

November, 1848, was void, so far as related to one moiety of the 18,686*l.*, and the accumulations thereon. And it was ordered that the Duke of Portland and C. H. Ellis should raise, by a sale, &c. a sum of 2666*l.* 13*s.* 4*d.*, and another sum of 942*l.* 14*s.* 1*d.*, and before the 1st June, 1863, should pay over the former to the trustee under Lady Mary's settlement, and pay to Lady Mary, on her separate receipt, the 942*l.* 14*s.* 1*d.* And their Lordships further declared that the two appointments dated 21st September, 1854, the one being of the annuity of 2720*l.*, and the other being of the dividends of the annuity of 52,000*l.* and accumulations during the life of the late Duke of Portland, and also the two appointments dated 19th December, 1854, the one being of the annuity, and the other of the dividends, were void, and that Lady Harriet and Lady Mary were entitled, in equal shares, to the said amounts of 2720*l.* and the dividends, &c. from the 27th May, 1854. And a case was ordered to be prepared for the Court of Session, as to the law of Scotland with reference to the validity of the appointment of the 28th October, 1848, as to the Scotch estates. And costs were reserved.

On the 20th June, 1863, the Lords Justices made another order, directing that notwithstanding the order of the 2d May preceding, the Duke of Portland, Lord Henry, and Lady Harriet, should before 20th July, 1863, or within seven days after service of this order, transfer to the Accountant-General in trust in the cause the 22,710*l.* 18*s.* 8*d.* consols in the order mentioned. And that Lady Harriet should, with the privity of the Accountant-General, pay into the bank, to the credit of the cause, the 3311*l.* cash therein mentioned, which sums were to be invested, and the interest

* 46 on the said sums to be paid * to Lady Mary on her separate receipt; and Lady Harriet was ordered to pay the costs of that application.

The case for the Scotch Court was prepared, but by arrangement was not proceeded with, and, by consent, the cause was directed to stand for hearing with regard to costs. On the 5th December it was heard, and the Lords Justices made an order that the costs of Lady Mary, so far as to the deeds of the 21st September and 19th December, 1854, should be paid to her.¹

The Duke of Portland appealed against the order of 2d May, 1863, so far as it discharged the orders of the Master of the Rolls,

¹ 1 De G., J. & S. 517.

and declared the two appointments of the 21st September and 19th December, 1854, void, and declared Lady Harriet and Lady Mary entitled, in equal shares, to the annuity of 2720*l.*; and ordered the Duke, Lord Henry, and Lady Harriet, to sell the 22,710*l.* three per cents., and pay the produce thereof to Lady Mary on her separate receipt; and ordered Lady Harriet to pay Lady Mary the sum of 3311*l.*, and so far as the order directed the Duke to pay costs. Lord Henry and Lady Harriet also appealed.

Sir H. Cairns (with whom were *Mr. B. Hardy* and *Mr. Alfred Bailey*), for the appellant, the Duke of Portland. — Looking at the deeds which create the power, it is clear that the power has been properly exercised. Their object was to grant the donee of the power a control over the property that would otherwise have passed without control to Lady Mary. The appellant had endeavoured to conform himself to the wishes of his father, the donor of the power, by effectuating that object. Had there * been no * 47 appointment, the fund would have gone to Lady Mary; it was therefore appointed to Lady Harriet. No doubt that lady would thus, in form, be made the mistress of the whole fund; but she knew what were the wishes of her father, and there was therefore good reason to expect that she would consider for herself whether at any future time a part of the fund might not be given to her sister. This expectation could have no effect on the validity of the appointment. [LORD ST. LEONARDS. — There was to be a “prudent suggestion” to her of what was to be done.] Prudent for a person possessing the power to act as she pleased. [LORD ST. LEONARDS. — If the object was wrong, it could make no difference that it was to be effected by a person who had a power given her for the very purpose of effecting it.] But the object was not wrong. Every parent has a right to interpose checks against a marriage of his child of which he disapproves. Lady Harriet was not called on positively to do any thing. Nothing of that sort is to be found in the deeds. She knew the wishes of her father, and a hope was entertained that she would act on them. She, herself, now claims the whole of the fund, as absolutely given to her by the deeds, and declaring that she never was asked to do any thing that would qualify her absolute right to it. She claims it free from all obligations. This shows that no equitable fraud can be alleged against the deeds. The appellant, the Duke of Portland,

is compelled to come here. He is told by the Court below that what he has done is wrong, and he cannot do any thing till by the judgment of this House he may find whether he can execute a new appointment. [LORD ST. LEONARDS. — You must not assume that he has a power to do so; or, if he has, there is no necessity for his coming here.] Any donor of a power has a right to

* 48 come here to be assured * whether his exercise of it has been invalid. He made no contract with the appointee; if he had done so, it would have been bad. He was advised that he could not make a conditional appointment; he made an appointment, absolute in form, in the hope that Lady Harriet, knowing the wishes of her father, would exercise her absolute control over the fund in accordance with those wishes. [THE LORD CHANCELLOR. — If the Duke made that representation to Lady Harriet, and she said, "I accept the obligation," would that make the appointment good?] But no such representation was made to her, and she never signified such an acceptance. The appointment in terms leaves her perfectly free. [THE LORD CHANCELLOR. — But the understanding existed. Would not every conscientious person say, that no more sacred obligation could be created than a trust thus made dependent on honour and filial feeling?] Courts cannot deal with appointments on principles of that kind. [LORD ST. LEONARDS. — Lady Harriet never had absolute control over the whole fund — it was placed in the hands of two other persons — nor was the money even in the hands of the bankers placed to her particular account. It was placed to the "S." account, which the evidence shows meant "Sister's" account.] The fund stood in Lady Harriet's name; it was therefore hers. If she did not choose to execute any trust of it, there was no power to compel her to do so. [LORD CHELMSFORD. — The order is not to invest the money, but to invest half of the payments made from the amount, in the joint names of the Duke, Lord Henry, and herself.] The effect of which is, that she would remain mistress of the fund, the other two being merely trustees under her directions. [THE LORD CHANCELLOR. — The temporary appointments related to temporary payments; but the order of the 18th October, * 1854, related to payments for all future time. She joined in a direction to the bankers as if she was the appointee of the whole fund; so that, since then, the income has been accumulated under an order made anterior to the permanent appointments.] That is

so, but there having been a power of appointment under the indentures of June, 1843, and November, 1848, and that appointment being constituted without any bargain, direct or indirect, between the appointor and the appointee, it is valid, notwithstanding any manner of dealing with the fund which the appointee has thought fit to adopt.

Mr. G. M. Giffard (*Mr. T. Stevens* and *Mr. C. E. Freeling* were with him), for Lady Harriet Bentinck. — Her Ladyship had not entered into any arrangement with any one as to the mode in which she should deal with the fund of which she was appointee; she believed herself to be absolutely entitled to the fund. The deeds were only subject to the power of revocation, but that power had not been exercised. The Duke had morely a hope and expectation that Lady Harriet would act as he wished. That cannot affect the validity of the deeds. A Court of equity will not act on mere suspicion where the execution of an instrument under a power of appointment appears fair, *M^r Queen v. Farquhar*.¹ And where there has been a power of appointment to a child, and the appointment has been to the husband and the child, the Court has declined to interfere. That seemed to support the legality of a stipulation between the donee of the power and its creator. But it was not necessary to put the argument so high, for there was no stipulation * here; there was nothing which bound * 50 Lady Harriet to any partition of the property. [LORD ST. LEONARDS. — Lady Harriet says she was entitled to one half of the fund, and that what she did was to carry the intention of the Duke into effect. Then she signed an order, and by that order the accumulation of half the income from the fund has taken place, and that half she has never pretended to deal with as her own. Put these facts together, and show the House how they prove that she considered herself entitled to the whole fund.] The Duke's intention was to make an absolute appointment to Lady Harriet, and in form he executed that intention, and the appointment is absolute. If she did not know of the expectation and agree to it, the fund was her property; if she did know of it, even then, there being no act of her own to divest herself of the property, it was still hers.

The Attorney-General (*Sir R. Palmer*) and *Mr. Rolt* (*Mr. C.*

¹ 11 Ves. 467.

Hall and *Mr. Rowcliffe* were with them), appeared for Lady Mary Topham, but were not heard.

THE LORD CHANCELLOR (LORD WESTBURY), addressing the Attorney-General, said : On the two appeals we have heard, which are entirely distinct from Lord Henry's appeal, the House does not think it necessary to trouble you, save as to this one point. The Lords Justices have set aside the appointments ; but you observe, instead of the decree stopping there, they go on to declare that the two sisters are entitled in equal shares. Now the Duke, the donee of the power, being a party to that decree, it might possibly hereafter be considered that the possibility of any future exercise of his
* 51 power of appointment * might be precluded by that decree.

The House, therefore, is disposed to affirm the decree, but introducing into it these words, " And that without prejudice to any question as to any future exercise of the power of appointment."

The Attorney-General. — Of course, my Lord, we cannot possibly object to that. It will be for your Lordships to consider whether the precise words might not be amended, so as to show that your Lordships do not hold out the notion that any future exercise could affect past accrued dividends.

LORD ST. LEONARDS. — There is a power of revocation in the appointment, distinctly. There are two questions. Supposing there was no power of revocation in the appointments, then one question would arise, whether an appointment being set aside on the ground of an evasion of the real words of the power, the donee of that power could execute a new appointment. That I am not looking at. But there is an absolute power of revocation in the appointment in question, and that power of revocation may possibly exist, independent of the decision on the validity of the appointment which has been made. Suppose, for instance, the Duke were, to-morrow, to revoke the appointment and make a new appointment, could he be estopped by any thing we now do, from trying that point ?

The Attorney-General. — Your Lordships will recollect that the form of the bill is such as to enable the Court to determine as to the present right to the funds which have accrued down to the present time.

THE LORD CHANCELLOR. — I thought I had put it in the most favourable form for you, because the words suggested by me were, with-

out prejudice to any future exercise of * the power of appoint- * 52
ment. You take the past dividends under the existing order.

The Attorney-General. — It appeared to me that those words would be quite sufficient; but I thought it my duty to mention what was passing in my own mind. That is the construction I should put on those words; they do not, as we conceive, and no appointment would, affect our right to any thing that has become payable and due previously to the time of the revocation.

LORD ST. LEONARDS. — Understand distinctly that the House pronounces no opinion on the continuance of the power of revocation, on the possibility of its being exercised. This House, in merely affirming the decree with an exception which will not prevent the exercise of the power of revocation, if it can be legally exercised, gives no opinion whatever upon that point.

The Attorney-General. — I did not think it could affect our right to any thing that has become payable.

LORD CRANWORTH. — I think you cannot be damnified, because dividends that have already accrued due necessarily belong to the parties under the appointment.

The Attorney-General. — And the decree goes on to direct the payment of them to us.

THE LORD CHANCELLOR. — My Lords, the case which is presented to your Lordships on behalf of the noble appellant, his Grace the Duke of Portland, in effect may be represented thus: that his Grace, feeling it incumbent on him to carry into effect what he received as the solemn wish and desire of his father, did therefore execute the two, or rather substantially the four, deeds which have been the subject of the present discussion.

* It is unnecessary to dwell upon the different views of the * 53
case presented at the bar by the counsel for the Duke, and presented by his sister, Lady Harriet Bentinck, in her answer. I can myself have no possibility of doubt that the Duke desired that Lady Harriet should know every thing that was passing in his own mind. But in reality that was not done, and these deeds were executed, no doubt retained by the solicitor of the Duke, and neither communicated nor their effect explained or stated to Lady Harriet, antecedently to the institution of this suit. The truth, therefore, was, that Lady Harriet was never placed in the position in which it is clear that the Duke desired that she should be placed,

and considered her to be placed, namely, in the position of a person having the absolute ownership of the fund, and left at liberty to deal with the whole, or any part of the fund, in such manner as she should think right. The Duke, by his agents, controlled the whole of the disposition of the fund. Lady Harriet states (of which there can be no possibility of doubt) that she herself was entirely ignorant of the fact that she had, or was intended to have, any absolute interest or control in or over these funds; and that in what she did for the purpose of giving effect to what the Duke originally desired should be done, but which he had been told could not be legally done, she acted merely instrumentally—merely for the purpose of giving effect to what she was told to do; and that she did not in that respect exercise any control, any will, or any right of disposition. The whole thing, therefore, was in truth an arrangement proceeding and emanating wholly from the donee or owner of the power; and it assumed that shape in which it is quite clear, from the very case of the owner of the power, that he was advised that the matter could not be supported.

* 54 * Without further dwelling on the matter, inasmuch as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just, and honest exercise of the power committed to the appointor, and which he is to exercise as a trustee. I will abstain from going further into the case. I think your Lordships will concur entirely in the conclusion which has been arrived at in the Court below.

But there is that point to which reference has been already made. The Court below has rightly set aside the deed of appointment. It is wholly unnecessary, therefore, to refer to the power of revocation.

contained in that deed. But that deed of appointment having been set aside as null and void, it is possible (on which no opinion is given or implied by the House) that the donee of the power may still exercise his original power. And therefore, my Lords, in confirming the decree which sets aside the deed of appointment, it may be desirable to include the words which have been already suggested, in order to prevent the decree being used hereafter as an * argument that will bar any attempt to exercise * 55 the power by the Duke. With that alteration, I should move your Lordships to confirm the decree, and to dismiss the appeal, which must be dismissed, I think, in the usual manner, namely, with costs.

LORD CRANWORTH. — My Lords, upon the facts as they have transpired now, from the answer from Lady Harriet, I confess, in concurrence with what has fallen from my noble and learned friend on the Woolsack, that I do not entertain a particle of doubt. The only reason why I rise to say a single word is this, that if the facts had been, as I had supposed them to be from the opening of Sir Hugh Cairns, namely, that the Duke had said to Lady Harriet, “ I wish, in order to carry into effect that which I suppose to have been our father’s intention, to accumulate one moiety of this fund, the accumulation to continue during the married life of my sister Mary ; but I find that this is impossible. I shall give you the whole. Make it entirely your own ; you may spend it all yourself, or you may accumulate one half if you think fit ” ; if that had been what had passed, I confess (not wishing to commit myself to any point that does not arise here), as at present advised, I should have thought that was a perfectly legitimate mode of dealing with the fund.

LORD ST. LEONARDS. — My Lords, the rules on this subject are so well settled that it is quite unnecessary to go through any authorities on the subject. A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit * for himself, directly or * 56 indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects, or attempts, to give it in that character.

Now here it is impossible not to see that Lady Harriet was made use of, not only as an intended donee, but also as an instrument, an agent, wholly unconscious of the real character of the donation, to carry into execution the intentions of the Duke. If you look at the dates, you cannot help being struck with them. Temporary appointments were made for the mere purpose of keeping the thing alive, so as to prevent the property resting in Lady Mary, if she did marry contrary to the wish of the late Duke. Those temporary appointments were dated in September, 1854.

Then comes an extraordinary letter from Mr. Ellis to Lady Harriet, who was then entitled under the temporary appointments. And he says, that he does not believe that he had before seen her, or had any conversation with her on the subject, and that his only communication was this letter of the 4th October, 1854: "Dear Madam, I have the honor to enclose an order for your Ladyship's signature; and in doing so, I should explain that the Duke lately executed deeds revocable at any time, but under which no payments beyond 600*l.* a year can for the present be made to Lady Mary. The half-year's dividend on 21,400*l.* three and a quarter per cents will this month be paid to your credit by the trustees, as well as 680*l.*, less property tax, for the quarter's double annuity. The arrangement made, which will be completed by the enclosed order (setting aside and making a fund for future disposal) has appeared to be the best, if not the only mode of faithfully
* 57 carrying into effect the late Duke's views and intentions."

Then there is an order enclosed, which she signs, being, as she tells you in her answer, wholly without knowledge that she had the slightest beneficial interest in that half of the fund over which the order operates. Then that order, the fund having been invested in the names of the three, is carried further, on the 28th October, 1854, by an arrangement which is to bind, in all future time, that moiety.

Then what comes afterwards? Why the absolute appointment. But the Duke, by his agents, had already fixed this sum as an appropriated fund, not for Lady Harriet, but for Lady Mary, to be tied up for Lady Mary, so as to prevent her from marrying, before the actual appointment was executed. The temporary appointments were set aside after this order for the investment and appropriation of the money, and then the absolute appointments were executed which gave the property in form absolutely to Lady Har-

riety—but, mind, not in form even, until she had executed that order which gave the warrant to the bankers to continue to keep that money at all times in the way which was understood between the parties. She was no more an appointee of the funded property than I am. She was an agent, or a hand, made use of for the purpose of carrying into effect what might be a very proper thing, for any thing I know, on the part of the Duke, but which he was not justified in doing under the form of an execution of the power.

My Lords, I confess I never saw a more naked case. There is really nothing to decide. The parties have shown that it was not a real transaction, as such appointments must be in order to be valid, but that it was a transaction founded upon an intention to give one half absolutely, and no more, to Lady Harriet, and to make her the instrument of tying up the other half for Lady * Mary, so that they might give it to her or not, just as * 58 they thought proper, afterwards. There is that account with the bankers marked “S,” which is admitted to mean “Sister’s,” and which we know means Lady Mary, and it was partially carried to that account.

Upon the whole, therefore, this is a case which it cannot for a moment be contended that the appointment is good. If not good for the moiety, which it is not, then it cannot be good for the other part; for the other part is given to the appointee who is to execute that purpose, which, of itself, destroys the whole appointment. I think, therefore, the case is perfectly clear; and that the moment you understand the facts, you cannot have the least doubt about it.

The difficulty which I confess I felt at first, was on the power of new appointment, as to whether that power continues or not, on which I decline to give any opinion. I think it is quite enough for this House to declare that it is a void appointment, and to set aside the appointment, but unless the whole case can be raised in argument, so as to put an end to the question as to the power of new appointment, I think, with my noble and learned friend on the Woolsack, that we are not at all called upon to prejudge that question. And I wish it to be distinctly understood that this House gives no opinion whatever on the power of the Duke to execute anew the power of appointment, now that it has declared that this appointment itself is void.

LORD CHELMSFORD. — My Lords, my noble and learned friends have so entirely expressed my views of the case, that it is not necessary for me to add any thing to what they have said, and in which I entirely agree.

*59 * *Mr. Osborne* (*Mr. Morris* was with him), for Lord Henry Bentinck. — On the question of the appointment to him of the two sums of 8000*l.* each, the appointment to him of both these sums is valid. The Duke and Duchess had, under the settlement of 1795, the power to appoint the two sums of 40,000*l.* each among the younger children in any way they thought fit. Lady Mary was aware that if her marriage took place, the late Duke would leave away from her every thing in his power. Under these circumstances, Lord George and Lord Henry were made appointees, and Lord George being dead, Lord Henry became the sole appointee of the fund, and there is nothing to prevent him from receiving it to his own use. The fund is so entirely his own, that had Lord Henry, after the appointment, become bankrupt, his assignees could have claimed it. That is a test of the effect of the appointment. [LORD ST. LEONARDS read a part of Lord Henry's answer, in which he said that in all the matters relating to these appointments he was "a complete dummy" in the hands of the late Duke. LORD CHELMSFORD read, as exactly expressing the point of the case, a part of the judgment of the Master of the Rolls¹ in this case.]

*60 * THE LORD CHANCELLOR. — My Lords, this case, which is now presented to your Lordships, it is impossible to distinguish in principle from the one which we have already disposed of. Indeed, even if it were possible to make a distinction, we have

¹ "If he [the appointee] refuse to give effect to the wishes of the appointor, he gets what it was never intended he should have, and enjoys property which, if his conduct could have been foreseen, might, and probably would, have been given to another. But the case is exactly the same; whether the consent or the agreement to act as desired be given or entered into before or after the appointment. The Court also would be placed in this dilemma: if it did not enforce compliance with the wishes of the appointor, it would be sanctioning the appointee in taking property never intended for him; and if this Court were to enforce it as binding in conscience on the appointee, the Court would enforce the execution of a power in favour of persons who were not the objects of it." — 31 Beav. 541.

facts in this case which negative all possibility of upholding this appointment of the Duke. The facts are plainly and distinctly admitted by the appellant; and it is no more than we should all have expected from distinguished persons occupying the high position which the parties to this cause do, that they should come before a Court of justice with a clear and explicit statement of the real facts of the case. They have done so, and there is no controversy about those facts; but principles of law, established for a long period of time, compelled the Court to take a different view of the legal effect of those facts from the view which was entertained by the parties themselves. They have been mistaken in their view of the law; they believe that they had a right to do that which they have done, and therefore they honestly did it; but they had no right to do that which they have done; and your Lordships would throw the whole subject of the law of appointments into the greatest confusion if any doubt were permitted to remain for a moment with respect to the principles which are applicable to this case. It was from this conviction that your Lordships have felt yourselves bound to interfere, and to put it to the learned counsel for the appellant, whether they will argue against those established rules. I must, therefore, my Lords, move that this appeal also be dismissed, and be dismissed with costs.

LORD CRANWORTH. — My Lords, I have nothing to add to what has been said by my noble and learned friend. I come to the conclusion * here, as a matter of fact, that all the parties * 61 knew perfectly well from the beginning for what purpose this sum of 8000*l.* was appointed.

LORD ST. LEONARDS. — My Lords, I think the case a great deal too clear to require any further observations.

The following order was afterwards entered on the Journals : —

Ordered, That the order of the Lords Justices of the 2d of May, 1863, be affirmed, with the following variation, viz. : after the words “and their Lordships do declare,” and before the words “that the two appointments in the pleadings mentioned,” insert “without prejudice to any question as to any future exercise of the powers of appointment”; and that the order of the Lords Justices of the 5th of December, 1863, be affirmed; and that the

three petitions and appeals be dismissed ; and that the appellants in the said appeals respectively do pay to the said respondents respectively, who have answered the said respective appeals, the costs incurred by them in respect of the said appeals.

Lords' Journals, 7th April, 1864.

1862. July 7, 8. 1863. June 29, 30 ; July 2. 1864. May 10 ; July 20.

DANIEL DELACHEROIS, *Plaintiff in Error*.

NICHOLAS DELACHEROIS, *Defendant in Error*.

Manor. Demesne Lands. Demise. Reunion. Purchase. Escheat.

The demesne lands of a manor previously granted in fee do not become reunited to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat.

If the demesne lands of a manor are treated, in a conveyance of them in fee, as a distinct property, as, for instance, being conveyed by the lord in fee without being accompanied by a declaration of the feoffor's title as lord, or being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain.

On repurchase, by the lord, of the fee simple, he will hold them of the chief lord.

They will not, on such repurchase, again form part of the manor, so as to pass under that description made in a will dated anterior to the purchase.

In the reign of Charles I., a grant was made by patent to Viscount Montgomery of a manor to be held in fee and common socage, with power to create as many separate manors, and to appoint as many tenemental lands to each manor as the grantee should think fit, and also with license to grant in fee simple or for lesser estates any of the lands belonging to such manors, to be held thereof respectively by suit of Court, and such other services or rents as he, his heirs, &c. should think fit, *non obstante* the Statute *Quia Emptores*. This patent was validated and confirmed by Acts of the Irish Parliament. The heir of the grantee, in the year 1721, granted by indenture of lease and release to A., in fee farm, certain of the tenemental lands of the manor. They were described as "situate, lying, and being in the manor," and were to be held at a rent of 6*l*. suit and service to the manor, payment of small sums for leet money, and an obligation to grind corn at the manor mills ; performance

of each of which things was secured by covenant; and the grantor also reserved a power of distress: —

Held, that the lands thus granted out were severed from the manor.

In March, 1836, the owner of the manor executed a will devising "the manor" to the younger of his two nephews. In 1842 he purchased the tenemental lands which had been granted out in 1721. He died in October, 1850, without having altered or republished his will: —

* *Held*, that these lands were not by the purchase reannexed to the manor * 63 so as to pass by the will, but devolved upon the testator's heir at law.

By letters patent, dated 11th October, 2 Charles 1, the king granted to Hugh Viscount Montgomery, his heirs, &c. to be held in fee and common socage, certain territories and lands "in the baronies of Clandeboy and Ards, in the county of Down (amongst which were the lands of Ballyhayes), constituting the manor of Donaghadee, otherwise Montgomery, with power to create as many separate manors as he should think fit, and to appoint as many tenemental lands to each manor, &c., and with license to grant in fee simple, or for lesser estates, any of the lands belonging to such manors, to be held thereof respectively by suit of court, and such other services or rents as he, his heirs, &c. should think fit, the Statute of *Quia Emptores*, or any other law, &c. notwithstanding."

This grant (with many others of a similar kind) was confirmed (with the *non obstante* clause expressly included) by Acts of the Parliament of Ireland.

Viscount Montgomery died, leaving a son Hugh, who in July, 1661, was created Earl Mount Alexander.

Henry, the third Earl of that title, became lord of the manor, and his son Thomas, afterwards the fifth Earl, joined in 1721 in an indenture of lease and release, and thereby granted in fee farm to one Luke St. Lawrence, of Dublin, "the town lands of Ballyhayes with the rectorial tithes thereof, situate, lying, and being in the manor of Donaghadee, in the barony of Ards, in the county of Down," at a rent of 6*l.*, suit and service to the manor, payment of small sums for leet money, and the obligation to grind corn at the manor mills, performance of each of which things was secured by covenants on the * part of the tenant; * 64 and there was also reserved to the grantor and his heirs a power of distress for default. There were then covenants for title on the part of the grantors. The lands thus granted

afterwards came into the possession of Mr. Joseph Hoare Bradshaw.

In 1775, by a partition deed made between Samuel Delacherois and Nicholas Crommelin, to whom these estates had come under the will of the widow of the fifth Earl, the manor of Donaghadee became vested in Delacherois, whilst the fee farm rent, reserved by the deed of 1721, and the mill of Donaghadee, and some other parts of the property became vested in Crommelin. This Samuel Delacherois was succeeded by his son and heir, Daniel, who died intestate, leaving two sons, Daniel (called in this suit "the testator") and Samuel, and a daughter named Mary. Samuel died early in 1836, leaving two sons, Nicholas and Daniel. The testator, by a will dated in March, 1836, devised all his real estates to his sister Mary for life, with remainder to the use of such of his nephews, sons of his late brother Samuel, as his said sister should by deed or will appoint, for the life of such nephew, remainder to the use of the first and other sons of such nephew in tail male, &c. In 1842 the testator purchased from Mr. Hoare Bradshaw the estate in Ballyhayes, granted by the deed of 1721. The conveyance was in the common form to a purchaser. The lands were described as "situate and being in the manor of Donaghadee, in the barony of Ards and county of Down." The testator died (without having republished or made any alteration in his will), on the 1st October, 1850. The sister entered into possession, and made her will, dated 4th June, 1852, whereby, after reciting this power of appointment, she appointed her younger nephew, Daniel (the plaintiff in error), to take all the real estate of her late * 65 brother in the manner described in his will. Mary * Delacherois died 10th March, 1854, and the nephew, Daniel, then entered into possession.

In 1856, Nicholas Delacherois, the elder of the two nephews, brought an action of ejectment against his brother Daniel, claiming to be entitled, as heir at law, to the lands of Ballyhayes, which he contended had not been disposed of by the will of the testator, for that they were purchased by the testator after the date of his will (which was executed before the passing of the Wills Act), and that, consisting as they did, of tenemental lands which had been severed from the manor, they did not pass by the general devise of "the manor."

The cause was tried before Mr. Justice Ball, at the summer

assizes of 1856, for the county of Down, when, on the learned Judge's direction, the jury found a verdict for the plaintiff, Nicholas Delacherois. On a bill of exceptions, tendered by the defendant, the Court of Common Pleas held the direction to be right, which holding was afterwards confirmed by a majority of Judges in the Exchequer Chamber. Lord Chief Baron Pigot dissented, being of opinion that "the grant of 1721, reserving services, retained, by means of those services, the lands in connection with the manor, and this the law allowed because the statutes of *Quia Emptores* and *De Prerogativa Regis* did not apply."

The present proceeding in error was then brought.

The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Williams, Mr. Justice Willes, Mr. Baron Bramwell, and Mr. Justice Blackburn attended.

Sir H. Cairns and *Mr. Hugh Law* (of the Irish bar),—*Mr. C. Hall* was with them, for the plaintiff in error. — This case must be discussed without reference to the *restrictions * 66 imposed by the Statute *Quia Emptores*, for the *non obstante* clause in the original grant from the Crown has been adopted and confirmed by the Irish statutes.

The lands purchased between the date of the will and the death of the testator passed by the general devise of the manor, for by that purchase they had become reunited to the manor. There is no doubt, indeed it was admitted in the Court below, that if they had reverted to the lord by escheat they would have passed, *Brunker v. Cook*,¹ *Brett v. Rigden*,² *Sheppard's Touchstone*,³ but it was denied that purchase had the same effect as escheat. In judgment in the Court below these demesne lands were spoken of as having been severed from the manor. That is incorrect. The lands themselves were demised in fee, but they continued to be held of the manor, were subject to suits and services, and retained all the characteristics of demesne lands of the manor. The seigniorship was still in the lord, though the profitable use of the lands was in the tenant. There is no ground for saying that there is a distinction,

¹ 11 Mod. 121, 129; Fitzg. 225, 231, nom. *Bunter v. Coke*, 1 Salk. 237, 238, nom. *Broncker v. Coke*, Holt, 247, 248.

² Plowd. 340.

³ Preston's ed. c. 23, p. 439.

in reference to the reunion of the lands with the manor, between tenemental lands escheated to the lord, and such lands purchased by him. A manor consists of demesne lands and of tenemental lands. The first are those which he retains in his own hands for his own use, the others are those which he demises to tenants to hold of his manor, Spelman¹ cited in Cruise,² but the whole constitutes his *dominium* or lordship, Co. Litt.,³ Wright's Tenures.⁴

* 67 * Where the lord creates a tenancy of any part of the demesne lands to be holden of his manor, the *dominium utile* is with the tenant, but the seigniorship remains with the lord, and when that tenancy is put an end to by escheat, forfeiture, surrender, or grant, the lands revert to what they were at the beginning, and form the demesne lands of the manor. If this was not so, this singular consequence would follow, that if the tenant conveyed to a stranger, the lands would still remain tenemental lands of the manor; but if he reconveyed them to the lord, they would lose that character. Such an inconsistency of result cannot happen. Mr. Preston in every instance treats tenemental lands, whether purchased or escheated, as identical in character, Preston.⁵ He says: "Lands which become part of a manor by an escheat, or by purchase, after the publication of a will, will pass as part of the manor." Not only in his original works, but in the notes to Sheppard's Touchstone does he state that tenemental lands purchased by the lord become part of the manor. Thus, Sheppard says:⁶ "If there be lord and tenant, and the lord purchase the tenancy; by this means the services are released and extinct in the law." To which Mr. Preston adds: "And the lands become parcel of the manor, and pass under that denomination, and may pass, inclusively with the manor, by a will made prior to the purchase of the tenancy." *Roe v. Wegg*⁷ distinctly established that doctrine, and *St. Paul v. Dudley*⁸ proceeded on the same principle. Of course this can only take place where the two estates, that of the lord and that purchased by him, are of the same nature as stated by Sir John Leach, M. R., in *Bingham v. Woodgate*.⁹ That was the

¹ Gloss. voc. *Manerium*. See also Spelm. on Feuds, ch. 1, Posth. Works, p. 1.

² Dig. vol. 1. p. 30, tit. Tenures, White's ed.

³ 191 a, Butler's note, No. 77.

⁴ Page 4.

⁵ 3 Prest. Conveyanc. 29, 30.

⁶ 2 Touchs. c. 19, p. 334.

⁷ 6 T. R. 708.

⁸ 15 Ves. 167.

⁹ 1 Russ. & M. 32.

case of a lord *of a manor who had purchased some of the *68 customary tenements of the manor. His Honour said: "If the lord had been seised of the fee of the manor, then the union would have extinguished the customary tenement. But extinguishment takes place only where the two estates have the same duration. The lord being tenant for life, the effect was to suspend the seigniorship during the life of the lord, for a man cannot at the same time be lord and tenant. But at the death of the lord the seigniorship was revived, and the fee of the customary tenements descended to his heir at law." It would be suspended where the purchaser had only an undivided part or share in the manor or tenancy; but when both parts came into the same hands the seigniorship would revive, Viner's Abridgment,¹ Gilbert on Rents,² Comyn's Digest;³ or when the purchaser does not have the absolute fee simple in both manor and tenancy. Co. Litt.,⁴ Brooke's Abridgment,⁵ Viner's Abridgment.⁶

Anonymous,⁷ which is in fact the case known as *Hutton v. Gifford*, proceeded on the principle that the purchase by the lord of the tenemental lands held of the manor, reunited the lands to the manor, and Viner⁸ so treats it. So in *Mountague's Case*,⁹ Sir E. Mountague being seised in fee of the manor of Warkton held *in capite* of the Crown, purchased seven acres in Oldfield which were held of that manor in socage, and the Chief Justices and Chief Baron held that thereupon the seven acres were held "of the King *in capite*, as the said manor of Warkton is held." Again, in *Creswell's Case*,¹⁰ some * grounds called Snoxhill were held *69 of the manor of Pallingfold, which manor was itself holden of the manor of Gorneshall, Tower Hill. This latter manor was granted by Henry VIII. to Sir E. Walsingham, to be held by knight service *in capite*. Sir E. Walsingham sold it to Sir E. Bray, who afterwards purchased the moiety of the manor of Pallingfold, and the lands of Snoxhill. His son and heir, to whom

¹ Vin. Abr. Extinguishment (E), pl. 2, 6.

² Page 183.

³ Suspension (F).

⁴ 148 b.

⁵ Extinguishment, pl. 48.

⁶ Vin. Abr. Manor (N), pl. 2, 4; citing Bro. Abr. Release, pl. 86, 96.

⁷ Sav. 21.

⁸ Vin. Abr. Manor (C), pl. 8.

⁹ F. Moore, 729.

¹⁰ Ley, 63.

these possessions descended, purchased the other moiety of the manor of Pallingfold, and afterwards enfeoffed Walter Creswel of the lands called Snoxhill. Popham and Anderson, Chief Justices, held that Snoxhill was holden *in capite*. It is impossible that this change of tenure could have taken place, except through the absolute reunion or reincorporation of the lands of Snoxhill with the manor, on the purchase of those lands by the owner of the manor. And in *Hutton v. Gifford*, Chief Baron Manwood expressly says, that "after the purchase of the tenancy, the tenancy is become parcel of the manors, and holden, as the manors were, of the King *in capite*." The expression of the Master of the Rolls in *Bingham v. Woodgate*,¹ is therefore fully warranted by the old authorities, and what was said there was afterwards adopted by Mr. Justice Patteson in *Graham v. Jackson*.²

There can be no doubt that there can be a surrender or resignation, and consequent extinguishment of a tenancy in fee, Bracton,³ who states the rule quite in accordance with the settled principles of the old feudal law. Mr. Baron Greene, in the Court below, misapprehended the real meaning of Fleta,⁴ when he * 70 * took the distinction that "the lord coming in by escheat does not take as the heir or assignee the estate which the ancestor or assignor had, but in substitution of the heir." The words *fit reversio* in the passage cited, do not mean that the lord has the reversion, but that the tenant returns the land, that which had been granted out, in other words, effects a return or reversion of it.

This is shown by Brooke,⁵ where it is said that if the tenant disclaims, the lord is out of possession, and nothing remains of the right to the seignior, except for the lord to have a writ of escheat to recover the land. Without a disclaimer, the lord continues owner of the land, subject only to the tenancy, which being brought to an end, he is owner of the whole as before. And in Domesday Book,⁶ this is shown in the case of property of St. Mary, Winchester, where a restoration of tenemental lands of a manor made

¹ 1 Russ. & M. 32.

² 6 Q. B. 834.

³ Lib. II. c. 8, § 4.

⁴ *Dominus loco hæredis etiam haberi poterit cui per modum donationis fit reversio cujuscunq: ten.* Fleta, lib. 6, c. 1, §§ 18, 19, p. 372, Selden's ed.

⁵ Bro. Abr. tit. Disclaimer, pl. 54.

⁶ Wiltshire Div. 14, pl. 1.

them again part of the manor. The dictum of Anderson in *Thetford v. Thetford*,¹ "that if one seised of a manor maketh a feoffment in fee of a part of demesnes, and afterwards repurchaseth them, and then makes a feoffment of the whole manor, the demesnes repurchased will not pass thereby," is contrary to the judgment of Chief Baron Manwood in the previous case of *Hutton v. Gifford*.² Nor does Periam appear to agree with Anderson in *Thetford v. Thetford*, and the case was not then adjudged, but was adjourned,³ and there is no further trace of it. In Brooke's Abridgment,⁴ it is said that "if a lease for life or gift in tail be made of parcel of a manor, there, during this interest, the land is not parcel of the manor * in possession, but the rever- * 71 sion is parcel of the manor." In commenting on this passage, Mr. Baron Greene said, "no doubt if a particular estate be granted of lands parcel of a manor, such lands are reannexed to the manor after the determination of the particular estate." This concedes the whole question. It cannot be material how such determination of the particular estate is effected. The case of *Holmes v. Hanby*⁵ is not an authority the other way, for it depended entirely on the fact that there could be no complete union of estates, for one was in tail and the other in fee.

The observations made in the note to *Dimes v. Arden*⁶ were carried in the Court below much further than the learned writer ever intended. In pointing out that lands might be reannexed to a manor by "an escheat in fee simple, or the determination of the particular estate," the writer did not intend, as in the Court below it was supposed, that "in those ways only" could lands once severed be reannexed. Nor does the note suggest how this "determination of the particular estate" must take place, or pretend to exclude purchase from the modes of effecting such a determination.

The case of *Mountjoy*⁷ was referred to on the other side for this dictum, "And as to the case of escheat of a tenancy, it was agreed for good law. For the act of law, or of God, will not prejudice any one. But if the lessor had purchased the tenancy, it would be otherwise, for that which is purchased is not parcel of the

¹ 1 Leon. 204, pl. 283.

² Sav. 21.

³ Leon. 204.

⁴ Bro. Abr. tit. Comprise, pl. 19.

⁵ 1 Sid. 284.

⁶ 6 Nev. & M. 499, n.

⁷ 5 Rep. 4, 6 a.

manor, because he acquires it by his own act." But that is not a doctrine of general law, but is only a dictum applicable under the special circumstances of that particular case. The case of *72 *Temple v. Cooke*¹ was likewise mistaken * in the Court below. At first it was supposed to be the same as that stated in *Jenkins's Centuries*;² but it is clear that they have no relation to each other. In *Temple v. Cooke*, the only point decided was on whom the duty lay of pointing out to the sheriff the particular lands of which partition was to be made. In *Jenkins's Centuries* the case was represented as having decided that A. on purchasing a manor did not thereby obtain, as part of the manor, lands previously purchased by B., which had been holden of the manor. The two things have no relation to each other, and the dictum in *Jenkins* is without warrant of authority.

The dictum in *Mountjoy's Case*,³ which was not necessary for the decision of that case, and the passage in *Jenkins's Centuries*,⁴ plainly erroneous if pretended to be founded on *Temple v. Cooke*,⁵ seem therefore to be the only authorities directly in point in support of this judgment, while the principles of our laws and even those of Scotland and of the Continent, where the feudal law has been more strictly followed, are all adverse to it.⁶

1863. June 29.

The Solicitor-General (Sir R. Palmer) and Mr. Whiteside (of the Irish bar), with whom was *Mr. Dart*, for the defendant in error. — No manor, properly speaking, was created in this case. After the Statute of *Quia Emptores* the King had no power to create a manor; he could not dispense with this statute; and the effect of the confirming statutes of the Irish Parliament, *73 passed with respect to these grants, * was merely that of quieting possessions, but did not extend to validate any thing which had been done without authority of law.⁷

¹ Dyer, 265 b.

² Page 232, pl. 4.

³ 5 Rep. 6 b.

⁴ Page 232, pl. 4.

⁵ Dyer, 265 b.

⁶ Menzies on Conv. 495; Ersk. Inst. 384, § 19; Bell, Comm. 683; Dalrym. Feud. Ten. 242; Chopin, Traite de Fiefs, tit. II. No. 25. Co. Copyholder, § 11, et seq.

⁷ This point was argued, and *Stradling v. Morgan*, Plowd. 204; *Hawkins v. Gathercole*, 6 De G., M. & G. 1; *Attorney-General v. Wyggeston Hospital*, 12

There is not here any evidence that if a manor of Donaghadee existed, these lands were held as of that manor. There was no tenure of that kind declared by the fee-farm grant of 1721. It was an absolute alienation of the fee simple of the lands without any declaration of a power to make the grant in virtue of any special right, or of the lands being granted or held in any special character. There was a mere reservation of a perpetual rent, with a power of distress, and charges of a certain kind were fixed on the property, and there were covenants by the lessee to pay the rent and to bear the charges. There is nothing to show that the lands were granted by the Earl Mount Alexander and his son, in relation to their rights in the manor, or that the lands were held of the manor, or owed suit and service to the manor; it was only stated that they were situate, lying, and being within the limits of it. Even if that deficiency had been supplied in the conveyance, it would not have preserved to the lands their original character. If the lord of a manor conveys customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the Statute of *Quia Emptores* must then hold of the superior lord, *Bradshaw v. Lawson*.¹ * There was here * 74 nothing but a mere personal contract with covenants for its performance, so that whatever had been the character of these lands up to that time, they then became wholly severed from the manor. There is certainly a covenant by the tenant to grind his corn at the mill of Donaghadee; but that mill itself was in 1775, by the deed of partition, severed from the manor, so that the covenant to grind corn there ceased to have any relation whatever to manorial services.

Then, as to the third, which is the chief point in the case. Assuming that there was a manor, assuming these lands originally to have formed part of the manor, still on their demise in 1721 they were severed from it, and on their purchase by the lord of the manor in 1842 they did not become reunited to the manor and

Beav. 113; and *Doe v. Davidson*, 2 M. & S. 175; were cited. (See also *Ewart v. Graham*, 7 H. L. Cas. 331.) Questions thereon were put to the Judges, who answered them, but the judgment of the House proceeded on the assumption that there was a manor to which these lands were attached, and that the real point for decision was, whether after such a severance as had been effected by the grant of 1721, the lands became reannexed to and formed part of the manor by the purchase of 1842.

¹ 4 T. R. 443.

form part of it, so as to pass by the general devise of the manor in the will executed in 1836.

The references to the laws of feuds and to the feudal laws of other countries are inapplicable here. A grant of the lands in fee simple severed them from the manor, and when once they were severed they could not be reunited to it, *Lemon v. Blackwell*,¹ *Thetford v. Thetford*.² To the same effect is Viner's Abridgment.³ In *Burrell v. Dodd*,⁴ the Court declared that "no freehold could be said, strictly speaking, to be parcel of the manor," and Brooke's Abridgment⁵ is to the same effect.

In *Burgess v. Wheate*,⁶ the particular point decided was that there was no escheat of an equitable interest, the discussion *75 of which involved the nature of the law of * escheats, and the Master of the Rolls showed that the lord was excluded from privileges which belonged to the heir by common law, and to the assignee by statute. And Lord Mansfield there said⁷ that when the land returned to the lord by escheat, it was no part of the tenancy, but was an extinction of the tenure. That cannot be said of the purchase of a tenancy, for that does not extinguish the tenure, but transfers it from the tenant to the purchaser. The land retains the same character in the hands of the purchaser as of the tenant, and acquires no other. If the purchaser is the lord, as no man can be at once lord and tenant, the tenure is gone, and he holds of his superior lord.

The same doctrine was declared in the Irish Court of Chancery in *Verschoyle v. Perkins*.⁸ There the Earl of Arran being seised in fee of a manor under a grant to his ancestor from James II., with a license to aliene, to be held of the grantee and his heirs, *non obstante* the Statute *Quia Emptores*, conveyed in 1834 the lands to J. P. and his heirs. It was held that no reversion was left in the earl, so that the lands were not let, set, or demised, within the meaning of the 19th section of 2 & 3 Wm. 4, c. 119, and therefore the estate of J. P. was liable to the tithe rent charge. This showed in the most conclusive way that the lands thus demised were absolutely severed from the manor. To the same effect is *Bond's Lessee v. The Trustees of Sterne's Charities*.⁹

¹ Skinner, 192.

² 1 Leon. 204.

³ Vin. Abr. tit. Manor (C), pl. 1.

⁴ 3 Bos. & P. 378, 381.

⁵ Bro. Abr. tit. Comprise, pl. 19.

⁶ 1 Eden, 177, 208, 209.

⁷ 1 Eden, 227.

⁸ 13 Irish Eq. 72. ⁹ Batty, 87, n.

Escheat like descent follows the nature of the estate, and the introduction of the power of alienation changed the chance of the escheat, but did not destroy it, Cruise.¹ In a case of such lands vested in a corporation, there *can be no escheat, *76 Cruise.² Where the grant is in fee simple there is no right to the land remaining in the lord; the severance of the land from the manor is complete, and the lord has only the rents and services, and the possibility of the possession reverting to him by escheat. But that is a seigniorial right, and is not an estate in the land. *Bingham v. Woodgate*³ does not apply here. The case itself involved merely the question, whether the union of the fee with the customary tenements had extinguished, or had only suspended them. The dictum uttered in that case had nothing to do with the decision of it, and if taken literally is not supported by the authorities. That, too, was a case relating to copyholds. So *Bunter v. Coke*,⁴ *Stephenson v. Hill*,⁵ *Doe d. Reay v. Huntington*,⁶ *Doe d. Cook v. Danvers*,⁷ *Roe v. Wegg*,⁸ and *St. Paul v. Dudley*,⁹ all relate to the passing of copyhold estates, and are not applicable here. These estates are not freeholds, though ordinarily denominated customary freeholds, for the fee of all copyhold land is in the lord, Hargrave's Notes to Co. Litt.,¹⁰ Blackstone's Law Tracts; ¹¹ and *Graham v. Jackson*,¹² proceeded on that ground.

The statement in Preston's edition of Sheppard's Touchstone is not supported by any one authority, but is contradicted by many, and is not in accordance with his own expression of opinion in other parts of his works.¹³

The estate of the tenant is the fee simple in the land, *and *77 it is not capable of being surrendered to the lord so as to merge in the lord's estate. If the lord takes a conveyance from his own tenant, he does not determine the fee simple estate. It is conveyed to him, and, by taking it, he extinguishes the rents and the right of escheat, and there being thus an end of the tenure,

¹ Dig. tit. 30, Escheat, § 8, et seq.

² Dig. tit. 30, Escheat, § 13.

³ 1 Russ. & M. 32.

⁴ 1 Salk. 237.

⁵ 3 Burr. 1273.

⁶ 4 East, 271, 288.

⁷ 7 East, 299.

⁸ 6 T. R. 708.

⁹ 15 Ves. 167.

¹⁰ 59 b, note 400.

¹¹ Cons. on Copyholders, p. 144, 8vo. ed.

¹² 6 Q. B. 811, 834.

¹³ Shep. Touchst. 90; 3 Prest. Conv. 9, 26, 540.

the lands are held of the superior lord alone. There is, therefore, no merger of the seignior, but an extinguishment of it. *Mountague's Case*,¹ and *Hutton v. Gifford*,² do not in the least contradict, but confirm these propositions. The after-purchased lands were not holden of the manor to which they had once belonged, but holden of the King *in capite*. And *Creswell's Case*³ is to the same effect.

It may, therefore, be admitted that what was said in *Mountjoy's Case*⁴ was not the point decided, but even treating it as a mere dictum, it is a dictum warranted by the authorities.

It may be admitted to be doubtful whether *Temple v. Cooke*⁵ is the same case as that found in Jenkins's Centuries,⁶ and certainly the one does not justify the other. But the authority of Jenkins is decisive for the defendant in error. He says, "A. purchases a manor of B. B. had purchased some tenancies of the said manor before the said sale by B. to A., being within the said manor, and held of it. This manor descends from A. to his two daughters. The said purchases of the tenancies belong to B., for they were not parcel of the manor at the time of the sale." If they did not pass as part of the manor, though purchased by B., before his sale to A., it is impossible to say that they would pass by a mere will when the purchase of them was made after the will was executed. *78 The case of *Holmes v. Hanby*⁷ is precisely to the same effect, and that too is the case of a purchaser for value, and not of a mere devisee.

The cases of copyhold do not apply here, but if they could be made to apply they would be in favour of the defendant in error. Escheat alone could make these tenemental lands again become part of the manor, and the fact that in copyhold lands, where the lord is owner of the fee, sale and surrender of a tenancy to the lord may reunite the demesne lands to the manor, so as to make them pass by a devise of "the manor," can give no authority for such a consequence with respect to the demesne lands of a manor which have been severed from it by a conveyance in fee simple.

Mr. H. Law replied.

¹ Ley, 63.

² Sav. 21.

³ F. Moore, 729.

⁴ 5 Rep. 4.

⁵ Dyer, 265 b.

⁶ Jenk. Cent. 232, pl. 4.

⁷ 1 Sid. 284.

LORD CRANWORTH proposed the following questions for the Judges:—

First. Whether there was evidence to go to the jury that there was, on the 5th day of January, 1721, a manor of Donaghadee, comprising the lands of Ballyhayes as part of the demesnes thereof?¹

Second. Assuming the existence of such a manor, was the effect of the deed of 5th of January, 1721, to vest Ballyhayes in Luke St. Lawrence and his heirs, wholly severed from the manor of Donaghadee, or was it to vest the estate in him and his heirs to be holden of the grantor as of the manor of Donaghadee?

Third. Assuming the existence of the manor, and that the lands of Ballyhayes remained after the deed of the 5th of January, 1721, a tenement, portion of, or holden of that manor, did the third part of those lands conveyed in * fee to the lord of * 79 the manor in 1842, become so reunited to the manor as to pass by the devise of that manor made on the 3d of March, 1836?

The Lord Chief Baron requested that time might be allowed to consider those questions.

Adjourned.

1864. May 10.

MR. JUSTICE WILLES now delivered the unanimous opinion of the Judges. — My Lords, as to the first question, we are of opinion that there was evidence to go to the jury that there was on the 5th day of January, 1721, a manor of Donaghadee, comprising the lands of Ballyhayes as part of the demesnes thereof.

The first patent of Charles I. granted manorial rights, in respect amongst other things of holding, not merely Courts leet, which, although usual incidents of a manor, do not necessarily involve that the lord should have a manor or seignior in respect of services rendered by the suitors, but also Courts baron, which are proper incidents to a manor or seignior, and cannot exist without freeholders owing suit and service to the seignior; or if there be demesnes in the hands of the lord, to the manor over the limits of which the jurisdiction extends. A Court leet involves only limits, and resiants therein, for its jurisdiction extends over resiants. A Court baron further involves the existence of freeholders owing suit and service to the manor; for failing them the Barons of the

¹ See ante, p. 73, n. 7.

Court and the Court Baron must *de facto* expire together, Co. Litt.¹ It therefore involves a manor or seignior; and nothing less than such a manor, with the right of creating holdings, which * 80 owe suit and service to the manor, and not immediately to the Crown, can satisfy the grant. The greatest caution and learning appear to have been bestowed upon the framing of this and the subsequent grant of the same king, which are studiously extensive and precise.

The framer, both of the first and of the second patent, anticipated the difficulty which was raised in *Chetwode v. Crew*² as to the creation of tenure in modern times upon a conveyance, in fee simple, of the demesnes of an English manor, so as to keep up or revive a Court baron which had failed for want of freeholders. And, accordingly, each of the patents in so many words professed to authorise subinfeudation in fee simple of any of the lands within the manor, to be held by suit of Court, and any other services or rents with a *non obstante* of the Statute of *Quia Emptores*, and any other statute to the contrary.

This and other patents of the like kind were soon brought into doubt, and it was thought proper that they should be confirmed by Act of Parliament, which they accordingly were, and if effectually so confirmed, the result is that this case was properly considered in the Court below as if the main question was unaffected by the statutes of *Quia Emptores* and *De Prerogativa Regis*.

With the view, then, of confirming amongst others the title to the manor in question, the Act of 10 Charles 1, sess. 1, c. 3 (Ir.), provided for the confirmation of defective titles by letters patent founded upon commissions of grace, and it extended *inter alia* to "manors," and it enacted that all and every person, &c. should enjoy "all such manors, lands, tenements, and hereditaments of what nature soever, according to the purport of the said letters patent, * 81 for such fines, &c., and with such privileges, liberties, profits, and commodities, and in such manner and form as in and by the said letters patent shall be limited and appointed." It went on to ratify the confirmatory patents to be granted, and to make them of the same force as if every clause was verbatim enacted by Parliament; and it enacted that "every clause, article, and sentence in them, or any of them, to be contained, forever from and after the making of the same letters pa-

¹ 58 a.² Willea, 614

tent, shall stand, be, and remain and be adjudged and taken to stand, and be of such and the same force and effect to all intents and purposes as if the same letters patent and every of them, and every clause, article, and sentence in them and every of them to be contained, were specially and particularly herein expressed, and by the authority of this present Parliament enacted."

This statute, it will be observed, expressly dealt with "manors," and contained words large enough to include all incidental rights. It was followed by the 10 Charles 1, sess. 3, c. 2 (Ir.), which explained and confirmed it. It mentioned as one species of defect to be cured, the "lack or omission of sufficient and special *non obstantes* of particular statutes."

In 1637, a general commission of grace, in terms extensive enough to authorise all that was done under it in this particular, accordingly issued, upon which the patent of the same year was issued regranteeing the land, and in express terms granting or creating (for the words are large enough for either) a manor of which Ballyhayes was part, and also in express terms the right to make subinfeudations in fee simple, and also the right to hold a Court baron and a Court leet. This patent appears to have been amply authorised by the terms of the commission of grace.

* That commission further declared that the King would *82 ratify what was done under it at the next Parliament.

Accordingly, the 15 Car. 1, c. 6 (Ir.), was passed for the purpose of confirming such patents of, amongst other things, "any manors, franchises, liberties, or other hereditaments," of what nature soever, by virtue of any commission of grace, and which render such patents valid, "notwithstanding any defect whatsoever, or any statute, ordinance, law, cause, matter, or thing, which might in any way impeach, enfeeble, avoid, or destroy any of the said letters patent in all or any points whatsoever."

It seems difficult to construe this latter statute in any other manner than as a statutory confirmation of the patent of 13 Car. 1, in its very terms, and as creating a manor with the right of subinfeudation in fee therein, notwithstanding the statutes of *Quia Emptores* and *De Prerogativa Regis*; and indeed, in our opinion, stopping here, the second patent was confirmed in terms, and a manor with such a power of subinfeudation was created. That power thus conferred by statute constitutes, in our judgment, the chief peculiarity of the case, and distinguishes the capacity of the

lord of such a manor from that of the lord of an ordinary manor in this part of the kingdom, in respect of creating tenure in fee simple at the present day.

Add to this, that the lands have been enjoyed under the said grants, and that in the conveyance to Luke St. Lawrence of 1721, the lands of Ballyhayes are described as in a manor, and that part of the consideration for that conveyance was suit and service to the manor Court, and that enjoyment was had under that conveyance.

Further add, that manor Courts were held and attended.

* 83 * Under these circumstances, we cannot doubt that there was at least (in the terms of the question), evidence to go to the jury that there was a manor of Donaghadee, comprising the lands of Ballyhayes as part of the demesnes thereof.

It is scarcely necessary to observe that copyholds, or a copyhold Court, of which the steward alone is the judge, or customary freeholds, as they are incorrectly called (see *Thompson v. Hardinge*¹), are not necessary to the existence of a manor, although in this part of the kingdom they are common incidents of one. We are not aware that these base tenures exist in Ireland. In them the freehold is always and immediately in the lord only, though the usufruct is in the tenant.

Without attempting to define a manor in the abstract, it is enough to say that the seisin of a defined district, with the power of subinfeudation therein, and the existence of freeholders holding of the manor, and the right to a Court baron, in which the feudatories are judges, does of itself constitute a seignior or manor within the considerations applicable to the present case.

As to the second question, assuming the existence of such a manor, we are of opinion that the effect of the deed of the 5th of January, 1721, was not to vest Ballyhayes in Luke St. Lawrence and his heirs wholly severed from the manor of Donaghadee, but that it was to vest the estate in him and his heirs to be holden of the grantor as of the manor of Donaghadee.

As to the capacity of the lord to create such a tenure, we consider that to have been established by the second patent of Charles I., and the statutory recognition thereof in the fifteenth year
* 84 * of the same King. And under this * head, therefore, it is only necessary to consider the effect of the conveyance of

¹ 1 C. B. 940.

1721. That conveyance was by way of lease and release; at that time the "common assurance of the realm." The effect of such a conveyance was, we apprehend, to convey the same estate and interest as, and no more than, if the same words were in a deed of the same estate executed with livery, Comyns's Digest.¹

What then was the effect, at common law, before the statutes of *Quia Emptores* and *De Prerogativa Regis*, of a feoffment by a mesne without expressly stating whether the feoffee was to hold of the lord paramount or of the mesne? According to Littleton, it was that he should hold of his own feoffor. And this is approved and repeated by Coke: "Before that statute (*Quia Emptores*)," says Littleton,² "if a man had made a feoffment in fee simple, by deed or without deed, yielding to him and to his heirs a certain rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service as the feoffor did hold over of his lord next paramount."

Upon this latter point, Lord Coke observes,³ that "this is evident and agreeth with our books, that in this case the law created the tenure; wherein it is to be observed how the law regardeth equity and equality, without any provision or reservation of the party."

And again, in the Second Institute,⁴ the commentary upon *Quia Emptores* is, "If the tenant had made a feoffment in fee before this statute generally, without reservation of any tenure, the feoffee should have holden of the feoffor as he had held over; for example, if he had holden by knight's service, the feoffee by creation of law had * holden by knight's service of the feoffor, * 85 in respect of the tenure over by him; and, therefore, if the lord had confirmed the estate of the feoffor, viz. the mesne, to hold by fealty only (which was socage), the tenure between the tenant and the feoffor should be socage also; because the tenure created by law followeth the tenure in respect of which it was created."

This was founded upon obvious good sense, for the mesne could not convey the fee simple without the seignior and right of reverter remaining in somebody, and there seems to be no good reason why, in the absence of express words to the contrary, that right

¹ Tit. Release (C 2).

³ Co. Litt. 143 a.

² Litt. § 216.

⁴ Co. 2 Inst. 501.

should not remain in the feoffor himself, in so far as that was consistent with the passing of the entire estate stipulated for to the feoffee.

This reasoning applies still more strongly to a case like the present, where there is an express reservation of rent, and where the conveyance is made in terms "subject always to the payment of the said yearly rent of 5*l.* sterling, and to the performance of the covenants," one of which was "to do suit and service at the manor Court," a tenant's duty.

As to the large words of the all estate clause, viz. "and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and of every part and parcel thereof, and all the estates, &c.," it must be remembered that the conveyance is dealing with, and operating upon what was to pass as between Lord Mount Alexander and Luke St. Lawrence. The ultimate seigniori must either have remained in the releasor or become vested in the Crown. The estate could not pass to Luke St. Lawrence without the seigniori remaining in one or other. It

did not affect the estate granted to him, but merely what
 * 86 should become of * his land upon the cessor of that estate, whether it was holden of the manor or of the Crown. There is no reason for construing these general words as a creation of a seigniori in the Crown any more than for construing them to release the fee-farm rent expressly reserved.

Further, the covenants to render suit and service would be inoperative unless tenure existed between the parties, and the whole deed must be read together.

It may be argued that these covenants sound in contract only, and not in render. But a reservation does not require any particular form of words, and a lease with a covenant by the lessee to pay rent, has been treated as a reservation. Hargrave's note to Coke upon Littleton.¹ It is there said, "lease for years by indenture, and lessee covenants to pay 5*l.* a year; this is a reservation."² But if there be reddendo rent, and the lessee covenants to pay two capons, there it seems to be only covenant."³ To this we may add Lord Coke's judgment in *Attoe v. Hemmings*,⁴ that a demise with a

¹ 47 *a*, note 289 (7).

² Lord Dacre's Case, Dyer, 275 *b*; *Drake v. Munday*, Cro. Car. 207.

³ M. 40, 41, *Eliz. Bruerton's Case*, Hal. MSS. See Cro. Car. 207, and Hardr. 326.

⁴ 2 Bulstr. 281.

covenant by the tenant to pay a yearly sum constitutes a rent as much as if that yearly sum had been reserved with a formal red-dendo.

These authorities show that a covenant for a service may be construed according to the intention of the parties as a reservation, otherwise it would be a covenant in gross, and so could not go with the reversion, according to the obvious intention of the parties expressed by the words "heirs and assigns."

The circumstance that the covenant to do suit, which can only be actually performed by a tenant, and the * effect of * 87 the clause making the lease subject to the rent and covenants, distinguish this from the case of the capons, and require us, acting upon the golden rule of construction, to give effect to the intention of the parties as it appears upon the whole instrument though the language used be not strictly and technically correct, to construe the deed as reserving suit of Court as a service. At the least, a rent is reserved, and in respect of land described as being within this manor.

It may be suggested that in this view the clause of distress would be inoperative. But that was no doubt intended *ex majori cautela*, and for the benefit of the lord, and it cannot affect the character of the rent. Clauses of distress have often been unnecessarily inserted in leases. In Littleton's time it was usual to insert a clause of distress even in leases for years,¹ and such clauses being in the affirmative, do not take away what is incident of common right.²

It appears to us, therefore, that upon the execution of the deed of 5th January, 1721, Luke St. Lawrence held of Lord Mount Alexander, *inter alia*, by suit of Court, and so necessarily of the manor.

The words "*ut de manerio*" are not, as it seems to us, necessary for this purpose, if the subject matter be part of a manor, and there is no intention shown absolutely to sever the part from the manor. There is a precedent in West,³ with a reservation of suit of Court, in which the words "*ut de manerio*" do not occur. Indeed, if a tenure exist, the reservation of suit of Court of itself indicates a holding as of the manor, to which the Court is incident.

It is right to add, that neither the first nor the second

¹ See Litt. § 331.

² Co. Litt. 204 b.

³ Symb. part 1, bk. 2, sec. 420.

* 88 *question was discussed in Ireland; and in dealing with them we have been spared from expressing any opinion at variance either with that of the majority of the Judges in the Exchequer Chamber there, or that of the Lord Chief Baron Pigot, who dissented from the judgment.

As to the third question, we concur with the Lord Chief Baron in opinion, that, assuming the existence of the manor with the statutory power of subinfeudation already referred to, and that the lands of Ballyhayes remained, after the deed of the 5th January, 1721, a tenement, portion of or holden of that manor, the third part of those lands conveyed in fee to the lord of the manor in 1842, did become so reunited to the manor as to pass by the devise of that manor made on the 3d March, 1836.

This question turns upon the effect of the Wills Act in force at the latter date, whereby a will passed only what the testator had at the time of the making of the will.

Now there can be no doubt that if the conveyance of 1721 is to be treated as one whereby the grantor "aliened away absolutely" parcel of the manor so as to disannex it therefrom, and to convey it to the grantee, discharged of any tenure or service, the repurchase would not have so reannexed that parcel to the manor as that the parcel should pass by a previous will. To this effect were numerous authorities cited in the argument. These cases, however, are altogether distinct from the present, for in them there was no tenure or service, but in fact and in law an entire severance from the manor. And the introduction of these authorities into this argument has tended to create much confusion. It is enough to point out that in such cases the right of escheat or other

* 89 *incident of seigniority did not exist, and upon the cessor of the estate, the Crown or other superior lord, and not the testator, had the right to enter and hold, not that estate, but as of his former estate free thereof. A good instance of this class is *Bradshaw v. Lawson*.¹

In this case, on the contrary, it cannot be disputed, in arguing the third question, that if the land had been reannexed by escheat or descent, it would have passed under the general words of the will, which are large enough to include the manor.

But it is said that there is a distinction between the case of escheat or descent, and purchase, and that in the latter case the lord

¹ 4 T. R. 443.

must be held to have acquired the tenant's estate in the same plight as if he had purchased a piece of land out of the manor. We cannot recognize the soundness of this distinction. In each case, as it appears to us, the right acquired by the lord is to the seigniority discharged of the tenant's interest. His title is not a new one to stand in the shoes of the tenant; but it is his former title, with the burden of the tenancy removed. Whether it is removed by escheat or descent, or by the purchase of the tenant's interest, there is equally a resumption of the freehold by the lord, upon which the tenure expires, and the immediate seisin is again in the lord as part of the manor.

It seems a strained construction of the law to say that if the lord had not purchased the interest of the tenant, the right of reverter and the services would have passed by the will, but that because the lord has purchased that additional interest in the land, nothing shall pass. It is as much as to say that the seigniority of the lord is extinguished in the interest of the tenant which alone remains, * instead of the lord holding as of his former * 90 title, discharged of the tenure, which is more consonant to analogy. In effect, the land, which never was absolutely severed from the manor, returned into the hands of the lord as part of his manor.

A very wide field of authority was traversed in the argument, over which we think it no part of our duty to follow. We content ourselves by selecting the following authorities, and with expressing our concurrence in the propositions which they lay down.

In Second Institute¹ it is said, "If the mesne release to the tenant, the tenant shall hold *per eadem servitia et consuetudines* as the mesne did; and so if the tenant infeoff the mesne, the mesne shall hold *per eadem servitia* as he did before; and so it is if the tenancy come to the mesnalty by act in law, as by escheat or descent, the mesne shall hold *per eadem servitia et consuetudines* as he held before; for albeit the tenure between the tenant and the mesne in these cases be extinct, yet the seigniority paramount, which also was issuing out of the tenancy, remaineth still." And see Co. Litt. 313 a, 314 a.

Here no distinction is drawn between release or feoffment and act in law, the effect in each case being stated to be that the tenure between the tenant and the mesne is "extinct."

¹ Co. 2 Inst. 502.

This is, therefore, an express authority for Mr. Preston's comment upon the passage, in his edition of the "Touchstone,"¹ the text of which is, "If a man make his will the 1st day of May, and thereby give the manor of Dale to one in fee, and the 10th of May one of the tenancies escheat, and the 20th of May the devisor dieth; in this case, and by this devise, it seems the devisee

* 91 shall have the * tenancy that doth escheat." To which Mr.

Preston adds, "for the tenancy is extinguished in the seigniority." This has been found fault with as unauthorised, but it is in accordance with the passage from the Second Institute applying both to purchase and escheat, and is, in our opinion, sound law.

For the same reasons we adopt as sound law (applied to a fee created at such a time and under such circumstances as to be held of the manor, so as to escheat to the lord, not the Crown), the passage in Mr. Preston's work on Conveyancing,² that "lands which become part of a manor by an escheat, or by purchase after the publication of a will, will pass as part of the manor."

We (being all the Judges who heard the argument) thus answer all the questions which have been put.

July 20.

LORD BROUGHAM. — My Lords, in this case I have had very considerable doubts, but those doubts are now completely removed. I have had access to the very able statement of my noble and learned friend (Lord St. Leonards), which I have no doubt he will read to your Lordships, and with which I entirely agree. I am of opinion ultimately that the Court below, in Ireland, was right in differing with the Lord Chief Baron, and the result of that is, that I should advise your Lordships to give judgment for the defendants in error; for I am of opinion that the third part of the lands of Ballyhayes, which were reunited to the manor by purchase, did not pass by the devise of "the manor" in March, 1836, and therefore that the devisee has not substantiated his claim. I may

* 92 state that I have read * with very great satisfaction the able, and well-reasoned, but as I must ultimately think erroneous, opinion of the five learned Judges, in which they all concurred.

I therefore move your Lordships to give judgment for the defendant in error, the heir at law.

LORD CRANWORTH (after stating the facts of the case) said: If

¹ Ch. 23, p. 439.

² Vol. 3, p. 29, 30.

this third part of Ballyhayes passed by the will of Daniel the testator, the title of the plaintiff in error is clear. But the defendant in error, Nicholas Delacherois, claims it as heir at law of the testator, on the ground that as to this third he died intestate. It was conveyed to him and his heirs in March, 1842, long after the date of his will, made in 1836; and the defendant in error contends that it was therefore unaffected by the will, and so descended on him and his heirs.

As the will was made before the Wills Act, 1837, the contention of the heir appears, on the first view of the case, to be well founded. But the plaintiff in error contends that the third of the lands, though purchased by and conveyed to the testator after the date of his will, yet passed by it, because he says the lands were freehold lands, holden of the manor of Donaghadee, of which manor the testator was seised in fee when he made his will in 1836, and that by the conveyance to the testator in 1842, the third part of these lands became reunited to the manor, and so passed by the previous devise of it.

The ruling of the learned Judge at the trial was clearly right, unless there was evidence on which the jury might find that there was a manor of Donaghadee of which the testator was seised in fee when he made his * will, and that the lands in question * 98 were holden of that manor, and further (assuming the existence of such a manor of which the testator was seised in fee when he made his will, and that the lands in dispute were freeholds holden of it), unless those lands would pass by a devise of the manor made prior to their conveyance to the testator.

In order to enable us by the assistance of the learned Judges to arrive at a just conclusion, your Lordships at the close of the arguments put to them three questions: [His Lordship stated them, see *ante*, p. 78.]

In answer to these questions, the learned Judges who heard the arguments have, through Mr. Justice Willes, given it as their unanimous opinion: —

First. That there was evidence to go to the jury that there was, on the 5th day of January, 1721, a manor of Donaghadee, comprising the lands of Ballyhayes, as part of the demesnes thereof.

Secondly. That the effect of the deed of 1721 was to vest the estate of Ballyhayes in Luke St. Lawrence and his heirs, to be holden of the grantor as of the manor of Donaghadee.

Thirdly. That the third part of Ballyhayes conveyed to the testator in 1842 did become so reunited to the manor as to pass by the previous devise of 1836.

Whether your Lordships concur in that opinion is the point now to be decided.

In the first place, as to the first two questions, I have no difficulty in declaring my full concurrence in the opinion of the learned Judges. Their reasons are so fully and so clearly expressed in their opinion delivered by Mr. Justice Willes, that I need do no more than refer to that opinion.

* 94 But it is on the third question that the difficulty * arises.

On this point, also, I was at first strongly inclined to concur with the learned Judges. I could see no satisfactory ground for a distinction between the case of a tenancy coming to the lord by purchase, and coming to him by escheats, by his own act, or by act of law. But, after all, this is a matter pre-eminently *juris positivi*. That in some cases there is a different legal result when the same thing arises from the act of the parties, and when from the act of law is certain; and the only question is whether the authorities show that this difference does exist in such a case as the present, and whether they establish that though, if lands of Ballyhayes had come to the testator after the date of his will by escheat, they would have become reunited to the manor so as to pass by the previous devise of it, yet that they would not do so when he acquired them by purchase.

I feel bound to say that an attentive examination of the old authorities has satisfied me, contrary to my first impression, that such a difference does exist, and so that the judgment below on this point was correct. And I come to this conclusion quite as much from a consideration of the cases relied on by the plaintiff in error, as of those brought forward by the defendant in error.

The case to which we were referred by the plaintiff in error, of *Hutton v. Gifford*,¹ had struck me as strongly supporting his argument; but a more attentive examination of it has convinced me that it bears in the opposite direction. The case is to this effect: John Hutton, seised in fee of the manor of Chambers, purchased from the Crown the manor of Crowland, of which the manor of

Chambers was holden. On the death of John Hutton these
* 95 manors descended on his son, John Hutton, who * conveyed

¹ Sav. 21.

them to feoffees to the use of himself, and his wife, and his own heirs. He afterwards purchased lands holden of the manor of Chambers, of which he afterwards made a feoffment to Gifford. It was said by Chief Baron Manwood in giving judgment, that on the purchase of the tenancy by the lord, it became parcel of the manors, and holden as the manors were of the king *in capite*. It is to be observed that throughout the case the report speaks of the manors in the plural, as if both were still in existence, which would not have been the case if, by the purchase by John Hutton of the superior manor, the inferior manor had become merged in it. It may be admitted, however, that if the case had ended at the passage I have quoted from the judgment of the Chief Baron, it would have afforded strong support to the case of the plaintiff in error. But the judgment goes on to say that when he (i. e. John Hutton) enfeoffed Gifford, Gifford shall hold this as the feoffor held it before. This shows that when it was said that by the purchase of the tenancy it had become parcel of the manor, it could not have been meant that it had been reunited to the manor in the same way as if it had been escheated; for in that case it would have been bound by the previous feoffment to uses, and John Hutton could not have made a feoffment of it to Gifford, so as to prevent his wife, if she should survive him, from being entitled for her life to the land. It is plain from the judgment of Shute, Baron, following Chief Baron Manwood, that in the view of the Court the wife had no such right. For he says that if J. Hutton die, leaving his wife, the tenant (i. e. Gifford) shall hold of the wife during life, a proposition incompatible with the notion that she would herself be entitled to hold and enjoy the land itself as part of the manor. The Court *decided that in * 96 her favour the seignioriness would, after her husband's death, revive during her life, and this could not be if there had not been such a union of the lands with the manor as would have subjected them to the operation of the previous feoffment to uses.

This case, therefore, appears to me to be an express decision not in favour of, but against the plaintiff in error.

Two other old cases were much pressed in argument at the bar, *Mountague's Case*¹ and *Creswel's Case*²; but they do not support the appellant's contention, but by implication point in an opposite direction. In the former of these cases the facts were that Sir Ed-

¹ Ley, 63.

² F. Moore, 729.

ward Mountague seised in fee of the manor of Warkton, which was holden *in capite* of the Crown, purchased seven acres of land holden of the manor in socage. It was decided that these seven acres from the time of the purchase were holden of the Crown *in capite*, by knight's service, "as the said manor was holden." This, it was contended at the bar on behalf of the plaintiff in error, showed that these seven acres had become parcel of the manor; but that is not so. The language of the Court cannot be reconciled with the supposition that these lands were considered to have become parcel of, and to have been reunited with the manor. The lands and the manor are treated as being two distinct things. If the lands had become part of the manor, it would have been incorrect to say that they were holden as that of which they formed part was held. The tenure was changed from socage to knight's service, because that was the tenure by which the manor was holden, not because the lands had become parcel of the manor.

* 97 * I do not go into the details of *Creswel's Case*. The observations I have made as to *Mountague's Case* apply equally to it.

The learned Judges refer to and rely upon a passage in the Second Institute¹ in support of their view of this case. But with all deference to them, I cannot think that Lord Coke meant in that passage more than was established in *Mountague's Case*; namely, that when the lord of a manor purchases lands holden of his manor, he shall hold the purchased lands not according to the tenure by which they were holden of him before the purchase, but by the same tenure as that by which his manor is holden. Lord Coke can hardly have meant more than this, when it is recollected what he himself states to have been held in *Mountjoy's Case*.² One of the questions there was as to what would amount to a variation of the accustomed rent, and it was held that in some cases where a variation of the accustomed rent would be bad if made by act of the parties, it might yet be supported if occasioned by act of the law, and the report proceeds: "And as to the case of escheat of a tenancy, it was agreed for good law — for the act of law or of God will not prejudice any one; but if the lessor had purchased the tenancy, it would be otherwise, for that which is purchased is not parcel of the manor, because he acquires it by his own act."

¹ Co. 2 Inst. 502.

² 5 Rep. 6 b.

On these grounds I feel bound to say that on the third point I am unable to concur with the learned Judges. They refer us to several passages in the works of the late Mr. Preston, in which he certainly treats the case of a freehold acquired by the lord by purchase, as carrying with it the same incidents as would have attached in case of an escheat. If I had found any old authority * warranting what Mr. Preston has so laid down, I * 98 should have been glad to follow it. I am not ashamed to say that I had always understood the law to be as he stated it. But a closer examination of the authorities has convinced me that I was wrong, and therefore I think there ought to be judgment for the defendant in error.

LORD ST. LEONARDS. — My Lords, this case, although apparently a simple one, is one of much difficulty, and upon which there has been great difference of opinion between the Judges of Ireland and the Judges of England.

The nature of the case is this: Delacherois, being the owner of the manor, or reputed manor, of Donaghadee, made a will, under which the appellant claims. The testator afterwards purchased a fee-simple estate within the manor. And if this estate was afterwards held of the manor, it passed by the prior will as part of it; otherwise it descended to the heir at law of the testator, the defendant in error. [His Lordship here stated the facts of the case, the proceedings in the Courts below, and the questions put to the Judges in this House, and their answers.]

These opinions, if acted upon by your Lordships, would lead you to reverse the decision in Ireland, and to decide the case in favour of the devisee.

I shall now consider these three questions separately, and state to your Lordships my opinion thereon.

I will assume that the grants from the Crown, and the Acts of Parliament, gave to the grantee a power to create manors, and allotted demesnes to them, and gave to him the power of granting the lands, in fee or otherwise, to be held of the manors, although the Act of the 15 Charles 1, c. 6, particularly referred to by the * Judges in their opinion, would require some expla- * 99 nation to ascertain how it bore on the estate now in dispute, if the right depended on that Act. Upon this question the Judges in Ireland gave no opinion.

Upon the first point, although I agree that there was sufficient evidence to go to a jury, that there was a manor of Donaghadee, comprising the land in dispute as part of the demesne, yet this is a very doubtful question ; and if there was such a manor, it is still more doubtful whether by subsequent events it did not cease to exist long before the purchase of the lands by the testator. It should be borne in mind that nearly a century had elapsed before the tenant under the Crown granted the estate to Luke St. Lawrence, 1721, and it would require much further evidence to show that the manor in question remained a legal manor, with its Court baron, down to the period which would enable the devisee to maintain the foundation of his title.

But assuming the existence of the manor, and the validity of the grants by the Crown, I have now to consider the operation of the deed of 1721, the grant from the Earl of Mount Alexander and his son to Mr. St. Lawrence.

Mr. Baron Greene in his elaborate judgment in the Exchequer Chamber in Ireland, which was adopted by the majority of the Judges there, concluded by saying that he was of opinion that it was nowhere established that the tenemental lands once severed from a manor can be reannexed, and again become parcel of that manor by being purchased by the lord. That proposition was indispensable to sustain the devisee's case, and had not been, in his judgment, established, particularly with reference to the law of devise. Upon the hearing of the appeal in this House,
 * 100 the learned counsel for the devisee * could not dispute this proposition, but denied that it was the point to be decided ; so that if the land was severed from the manor, it is not disputed that the judgments in Ireland were correct. Upon this point all are agreed.

I must now call your Lordships' attention to the terms of the conveyance of 1721, from the then lords of the manor (if the manor then existed) to Mr. St. Lawrence. I assume that they might, if the manor existed, make a grant in fee to be held of the manor. Of course the grant of the Crown in no respect restricted them from dealing with the property as they pleased. They could have sold out and out all the demesnes, and so have destroyed the manor, or have severed any portion of the demesnes by the sale of the fee.

The deed of 1721 is not what one should have expected to find

it, if it had been executed under the power in the King's Charter, and if there was still an existing manor. The grantors are not described as lords of the manor. The land is not described as held of or part of the manor, but in the description it is merely stated to be (locally) in the manor, just as in describing the boundaries it is stated to be bounded on the west with lands of Druneag, in the manor of Newtown, belonging to Robert Colville, Esq. The grantee is not to hold of or under the manor. There is not that of which the Statute of *Quia Emptores* complained, that grants were made to hold of the feoffors, and not of the superior lords; and although before the statute, under a feoffment in fee generally, without reservation of any tenure, the feoffee would, as Coke tells us, have holden of the feoffor, yet, in 1721, unless in a case not governed by the statute, no such subinfeudation could be created; and, therefore, if the case was taken out of the operation of the statute by the King's grant, we cannot doubt that some trace of the intention * to exercise the delegated power *101 would appear on the face of the grant. But the entire frame of the deed shows, I think, that the framer of the deed (and it is scientifically drawn) was aware, that although there was a reputed manor, there was not a legal one; and therefore, as he could not rely on tenure, he must trust to contract, just as (amongst many instances) was done in the case of *Chetwode v. Crew*,¹ and *Bradshaw v. Lawson*.² The deed, I say, is in every respect precisely what a competent draughtsman would draw to give to the grantor, who had not a legal manor, all the benefits which contract could confer, although tenure would not. Every drag-net clause is inserted, in order to leave no interest in the property in the grantor. A rent is reserved, not as incident to tenure, but with an express power of distress; and a covenant by the grantee, for himself, his heirs, and assigns, to pay it; and covenants are also inserted from the grantee in like manner, to do suit and service at the manor Court, and to pay leet money. The covenants by the grantors are the largest that could be framed from a grantor parting for ever with all interest in the estate, except what was secured by contract; and they are accompanied by a general warranty.

I am of opinion, therefore, that the deed of 1721 did operate to sever the demesne land comprised in it from the manor; and, if I am right, it is admitted that the devisee has no title.

¹ Willes, 614.

² 4 T. R. 443.

If I am wrong in the view I take of the operation of the deed of 1721, and of the estate under that deed holden of the manor, then the third question still remains to be considered, viz. assum-

ing the existence of the manor, and that the land of Bally-
 *102 hayes remained after *the deed of 1721 a tenement portion
 of or holden of that manor, did the part of those lands
 conveyed in fee to the lord of the manor in 1842 become so re-
 united to the manor as to pass by the devise of that manor by the
 will of 1836.

Now, as we have seen, this land was held by the lords in fee simple, and they conveyed it as such. If the demesne lands of a manor are treated by conveyance as a distinct property, they cease to form part of the manor, although the rents and dues may remain: for example, a fine formerly levied of them, and the same estate taken back, would have severed them. Where the fee was in a grantee originally, the lord had only the seignior, which he held in common cases of the Crown. The land ceased to form part of the demesnes, and was held by a freehold tenant of the manor. If ultimately the lord repurchased the land, he thereupon became the fee-simple owner of it; and he held not of himself (for a man cannot be lord and tenant), but he held this portion now of the chief lord. It had lost its character of demesne land, and there being no tenant of it, it is no longer held of the manor. There is no custom which attaches to it. The lord is simply seised in fee, as he was before the grant was made; but it is no longer really part of the manor, although in common parlance it may be so termed.

With these general observations, we may first consider the conveyance of 1842 to Delacherois, then lord of the manor, if it existed. Here, again, we are surprised at the form of the conveyance. It is in all respects just such a conveyance as Mr. Bradshaw, the then owner, would have made to any stranger as the purchaser. It is throughout in the common form of such a conveyance. The purchaser is not stated to be lord of the
 *103 manor; the *lands are not described as held of the manor; nothing is said of suits or services. The deed recites the seisin in fee in the sellers of the property, "subject to the yearly head or chief rent of 2l. per annum." The property is described in the operative part as lying in the manor and in the barony and county; and the purchaser accepts the covenants for title from the

seller as against all possible estates and encumbrances. It is, I repeat, precisely such a conveyance as would be made of a common fee-simple estate to a purchaser wholly unconnected with the seller or the property in estate or privity. And this strengthens the view I have before suggested, that the manor as a legal manor had ceased to exist. It is a remarkable circumstance that the original grant of the lands by the lords, after nearly a century of enjoyment by the lord for the time being, should have been silent as to its being held of the manor, or as to its forming still a portion of the manor; and that after nearly a century and a quarter's enjoyment of the land by the grantee, and those claiming under him, when the other lord repurchased the land, the conveyance to him should have assumed the form to which I have drawn your Lordships' attention. In my opinion, this reconveyance did not operate to make the land once more demesne land of the manor, but the lord became seised in fee of it as a distinct property held of the Crown.

And, therefore, I hold that it did not pass by the prior will of Delacherois, the purchaser.

Still, however, treating the estate as held of the manor before the conveyance to Delacherois, there arises an important question of law, viz. whether there is any distinction in such a case between escheat to the lord and purchase by the lord. It is well settled from the earliest period that in case of escheat or descent — acts in * law — the land would be reannexed to * 104 the manor; and in this case the property would have passed by the prior will as included in the manor.

The learned Judges, whose assistance we had, are of opinion that the case of purchase by the lord cannot be distinguished from the case of escheat or descent; they do not recognise the soundness of the distinction. In each case, as it appears to them, the right acquired by the lord is to the seignior, discharged of the tenant's interest. With great submission, it appears to me that the lord's seignior was in no respect acquired by the lord under the conveyance; for, in the view we are now taking, it was never out of him, but what he did acquire was the actual fee simple in possession of the land itself. And the real question is, whether that would be reunited to his seignior so as to form once more, properly speaking, a part of the manor; if not, of course there was an end of the seignior, for he could not hold of himself.

It appears to me that it is much too late to overrule the settled distinction between escheat and purchase. It has, I think, never been decided that they stand upon the same footing. I call the distinction a settled one, because, from a very early period, it has been handed down to us from the highest authorities as existing. Nor is there any thing unusual in the law in distinctions between the operation of acts of the party and the operation of acts of law; and although we may not see why the distinctions were established, it is our duty to pronounce upon the law as it stands; and this distinction prevails as to manors and demesnes, as we find in *Sir Moyle Finch's Case*,¹ and in *Knight's Case*,² and many other authorities.

* 105 * After the opinions which have been delivered upon this point, I think it necessary to refer to some of the authorities which established this distinction. In *Mountjoy's Case*³ it is expressly laid down "as to the case of escheat of a tenancy it was held for good law; for the act of law or of God will not prejudice any one; but if the lessor had purchased the tenancy it would be otherwise, for that which is purchased is not parcel of the manor because he acquired it by his own act." Coke winds up his report by saying, that many other matters were moved by the counsel on both sides at the bar in this case, which he purposely omitted because the Court gave no resolution of them. This gives great weight to the resolutions which are retained.

In *Knight's Case*,⁴ Justice Pirryam said, if three acres were held by suit of Court, and the lord purchased one of them, or granted over his seigniority in one, the suit is gone for all; yet if one escheat, or it be aliened in mortmain, and the lord therefore enter, the suit shall remain for the residue.

In Jenkins's Centuries⁵ the case was this. A. was lord of a manor, and he had purchased some tenancies of the manor, being within the manor and held of it. B. purchased the manor. Held, that the purchases belonged to A., for they were not parcel of the manor at the time of sale. Then B. purchased the tenements, and upon a *partitio facienda* of the manor, yet the said tenements so purchased are not to be divided where the suit is of the manor only.

¹ 6 Rep. 64.

⁴ F. Moore, 203.

² F. Moore, 199; 2 Rolle, Abr. 122 (G.).

⁵ Page 232, pl. 4.

³ 5 Rep. 6 a.

In *Thetford v. Thetford*,¹ Chief Justice Anderson put this case. One seised of a manor maketh a feoffment in fee of part of the demesnes and afterwards repurchases * them, and then * 106 makes a feoffment of the whole manor. The demesnes repurchased shall not pass thereby, for they were once severed from the manor, and not reunited by the purchase. But he and Pirryam agreed, that although in truth it is not a manor, or any part of a manor, yet if it hath been reputed such it shall pass by that name.

In the case of *The Queen v. Duchess of Buccleugh*,² it was resolved by the whole Court of King's Bench, that lands once severed from a manor can never afterwards become parcel of it in reality, but they may by reputation; as if lands, part of a manor, be aliened away absolutely and repurchased, and a unity of possession for a considerable time after. This, however, it may be said, does not rule the case before us, upon the point which I am now considering, for in this case there was an admitted severance.

In *Trantor v. Duggan*³ Chief Justice Holt said, "A tenancy escheated to the lord becomes part of the manor; but if the lord purchase part it is only holden of the manor and not part of it, but the rent and services are part." I may here observe, that if the lord purchase all the frank tenements, or all but one, the manor is extinguished in the first instance, because there cannot be a manor without a Court baron, and there can be no Court baron without suitors; and in the second instance, because there cannot be a Court baron without two suitors. And in these instances the law is the same as to escheat, for both escheat and purchase have the same operation, viz. they deprive the manor of its Court baron, and that necessarily works an extinguishment, Rolle.⁴ But this in no respect affects the general settled distinction * between escheat and purchase. There are many other * 107 authorities in favour of the distinction, but it is unnecessary to refer to them, as they will be found in Mr. Baron Greene's judgment in the Exchequer Chamber.

The Lord Chief Baron of Ireland, in delivering his opinion as opposed to the rest of the Judges, relied upon *Mountague's Case*.⁵ He said he did not go into the details of it, but he did not find it

¹ 1 Leon, 204.

² 6 Mod. 150.

³ 12 Mod. 138.

⁴ 2 Rolle, Abr. 121 (F).

⁵ Ley, 63.

possible to reconcile the judgment of the Court in that case with any other view than this: that where lands are held in fee as of a manor by service to be rendered to the owner as such, these lands are capable of being reunited to the manor by purchase of the land, from the owner in fee of the land, by the owner in fee of the manor; and the same appeared to him to be the result of the cases of *Mountague* and of *Creswel*.¹ These cases were not relied upon by the learned Judges who delivered their opinion in this House, and they appear to me not to warrant the construction put upon them by the Lord Chief Baron. Take *Mountague's Case* as an example. Sir Edward Mountague held *in capite* the manor of Warkton; of that manor seven acres of freehold were held in socage, so that he held his manor *in capite*, and the owners of the seven acres held of his manor in socage. He bought the seven acres; and if the purchase would have reunited them to the manor of which previously to the purchase they were held, they would have been reunited to Sir Edward's manor.

But the Lord Chief Justices and Chief Baron, Montague, Hubbard, and Tanfield, resolved, "That the seven acres were *108 held of the King *in capite* by knight's service, *as the manor of Warkton was held, of which manor the seven acres were some time held in socage until the said purchase." It was not said that they again formed part of the manor; but as it appears to me, they were treated as severed from the manor; and as subinfeudation was forbidden by the Statute of *Quia Emptores*, they were holden of the King *in capite*, like as the manor itself was. If the seven acres had been by the purchase reunited to the manor of which they were originally holden, the manor including them as still part of it would have been holden of the Crown *in capite*, and they, as a separate independent subject would not have been holden of the Crown.

I am unwilling to enter into a long explanation of the case in Saville, reported there as *Anonymous*, but which is the case of *Hutton v. Gifford*.² The lord of both manors there having by his purchase of the superior manor extinguished the sub-manor, whereby the tenant paravail then held of the superior manor, which was held of the Crown *in capite*, and the service having been in every case knight's service, the lord then purchased the land of the tenant paravail, and then sold to a stranger; and the

¹ F. Moore, 729.

² Sav. 21.

question was of whom he held. There was, therefore, there both a repurchase by the lord, and a subsequent sale by him, which of course operated as a severance. Knight's service, in any view, was due for the land in the hands of the last purchaser, and the question was decided in favour of the Crown; so that he held direct of the King *in capite* by knight's service. That case does not appear to me to support the case of the plaintiff in error.

The last of the three cases relied upon in Ireland is **Creswell's Case*,¹ which was governed by the same rule as the * 109 last case. The manor of Gomershall, Tower Hill, which came to the Crown upon the dissolution of monasteries, was granted by the Crown to Sir Edward Walsingham in fee *in capite*. The manor of Pallingfold was held of the above manor by suit of Court, and 8s. 4d. rent. Certain lands were held of the last-mentioned manor by suit of Court, and 33s. 4d. rent. Sir Edward Bray purchased the superior manor, and also half of the mesne manor, and the lands held of it by suit of Court, and 33s. 4d. rent. They descended to his son, who purchased the other half of the mesne manor, so that he became seised of both manors and of the lands before referred to. He afterwards conveyed those lands to another by feoffment. And the question was of whom did the feoffee hold; and it was, by the opinion of Popham and Andrews, Chief Justices, resolved, that he held *in capite*, by an entire knight's fee. It seems that he was held to stand in the place of the Brays, and they were considered to have held these lands by knight's service *in capite*. The lands were of course wholly severed from the manors; and the decision, like that upon the case in Saville, appears to me to have depended upon the land in question having become no longer part of the manor of which it was holden originally, or of the superior manor; but acquired by Sir Edward Bray by purchase, and held by him of the Crown, as a distinct subject, and by the same service as the superior manor was itself held of the Crown. It appears to me that the plaintiff in error can draw no aid from these cases. I may observe that in cases like this the Judges * of that period had a strong leaning in * 110 favour of the rights and revenues of the Crown.

But, my Lords, although the learned Judges in their opinion did not rely upon the cases to which I have thought it necessary to draw your attention, yet they did rely upon two authorities, which

¹ F Moore, 729.

I am under the necessity of considering with all the attention which is due to the opinions of those very learned persons. The first authority is from the Second Institute,¹ where it is said, "If the mesne release to the tenant, the tenant shall hold *per eadem servitia* as the mesne did; and so if the tenant enfeoff the mesne, the mesne shall hold *per eadem servitia*, as he held before; and so it is if the tenancy comes to the mesnalty by act in law, as by escheat or descent, the mesne shall hold *per eadem servitia et consuetudines*, as he held before; for albeit the tenure between the tenant and the mesne, in these cases, be extinct, yet the seigniorie paramount, which also was issuing out of the tenancy, remaineth still." Here, the learned Judges add, no distinction is drawn between release and feoffment, or act in law; the effect in each case being stated to be, that the tenure between the tenant and the mesne is extinct. This passage from the Second Institute is referred to in the case of the plaintiff in error, as an example in our early law books in which purchase by, and escheat to, the lord of the manor, are classed together, and treated as producing the same effects. No doubt that there may be cases in which they may have the same operation, as in the instance which is also referred to in the case, and which I have before mentioned, where the

* 111 manor is extinguished by the acquisition, * by the lord, of all the freehold, and it is there, of course, indifferent whether the extinguishment is caused by escheat, or descent, or purchase; there are no longer any freeholders of the manor, and the manor itself is extinguished.

It does not appear to me that the rule stated in the Second Institute bears the construction put upon it, namely, that where the lord repurchases the tenemental estate, the immediate seisin is again in the lord as part of the manor. As the rule is stated, if the mesne lord release to the tenant, the tenant shall hold by the same services as the mesne did. This release would of course sever the land from the manor of which it was held, and the releasee would hold of the chief lord; and if that tenure was *in capite* by knight's service, might have had to pay a whole knight's fee.

The rule then states, "and so if the tenant enfeoff the mesne, the mesne shall hold by the same services as he held before." This does not prove that the land is again in the immediate seisin

¹ Co. 2 Inst. 502.

of the lord as part of the manor, but that he holds it of course in fee, and like as he held the mesne manor, and therefore holding of the seigniorie paramount, and if the holding under that was *in capite* by knight's service, he might have had to pay for the land a fee for a whole knight's service.

The case before your Lordships cannot, as it appears to me, be governed by the construction which has been put on the rule from the Second Institute; and, indeed, if that rule was in itself sound, and had been recognised as law, the opinions during so long a period of so many eminent Judges, that the distinction between escheat and purchase did and does exist in law, never could have been expressed. Coke himself could not have considered the rule as breaking in upon the settled distinction which

* he had reported specially as resolved in *Mountjoy's Case*.¹ * 112 If, as it is now urged, this rule is opposed to the resolution in that case, surely Coke would have drawn attention to the circumstance, and explained the true meaning of the rule.

The other authority relied upon is Mr. Preston, who in his edition of the Touchstone, and in his works on conveyancing and on abstracts, states that the law on this subject is the same as to purchase and escheat; and the learned Judges consider the rule as laid down in the Second Institute² as an express authority for his statement in the Touchstone, although he makes no reference to it, and his other statement they adopt as sound law.

It does not appear to me that Mr. Preston had any intention to lay down any abstract proposition which could bear upon the case now before the House. He was not likely to treat as a settled point, without referring to any authority in support of his view, that purchase and escheat were, in the cases we are considering, equal to each other, whilst the ancient reports and law books in so many instances draw a clear distinction between them. I think it will be sufficient to refer to what he says in the third volume of his conveyancing.³ He there refers to the merger, of estates in fee of the copyhold tenure, in a particular estate of the freehold tenure. It is, he says, the tenancy rather than the estate which is extinguished; therefore, cases applicable to copyholds do not strictly fall under the law of merger. He then shows where the tenantry by copy will be extinct, or superseded by the accession of the freehold tenure to the tenure by copy of Court Roll. "So if

¹ 5 Rep. 6 b.

² Co. 2 Inst. 502.

³ 3 Prest. Conv. 29, 30.

the lord of the seignior purchase a tenancy, the tenancy
 * 113 will be extinct, and go * inclusively with the manor." For
 this he quotes *Bunker v. Cooke* and *Roe v. Wegg*, which are
 confined to copyholds. He then proceeds, "The consequence is,
 that the purchased lands will pass by the will of the owner as part
 of the manor, though the will by which the manor is devised, is
 made before the purchase. The same point applies to the pur-
 chase of a tenancy; also to the devise of a manor, and the subse-
 quent escheat of a tenancy in the manor." For which he cites
Doe v. Pott and *St. Paul v. Lord Dudley*, both cases of purchases
 by the lord of a copyhold held of the manor. Mr. Preston adds,
 "For though it be a rule that lands purchased after the publication
 of a will will not pass by that will, without a republication, yet
 lands which become part of the manor by an escheat or by pur-
 chase after the publication of a will, will pass as part of the manor.
 In fact the manor comprises the tenancy; the possession comes in
 the place of the seignior, and the land becomes parcel of the
 manor. The seignior, when purchased by the tenant, is extin-
 guished, and has no distinct existence, and being once extinguished,
 there is an end to all further deduction of title. Following the
 same analogy there will, on the purchase by a lord of a manor of
 a copyhold tenement, be an extinguishment of the copyhold tenure,
 although the demisable quality may remain," and for this he cites
Doe v. Pott and *Roe v. Wegg*, in which the very point was decided,
 and *St. Paul v. Lord Dudley*.

This somewhat confused statement may be accounted for from
 the subject not properly forming part of the merger of estates of
 which he was then treating. It seems clear to me that his remarks
 were intended to be confined to copyholds, to which alone his
 authorities refer, and that he had not in his view the questions
 now before your Lordships, which he knew those authorities
 * 114 * did not touch, and for which he did not quote any author-
 ity. Nor, indeed, if he had intended his observations to
 apply to a case like the present, could he, as it appears to me, have
 found an authority to support his opinion. His concluding obser-
 vation that the seignior when purchased by the tenant is extin-
 guished and has no distinct existence, may require explanation.
 By the purchase of the copyhold tenant his tenancy is extinguished,
 and he holds the fee simple. There is no longer any seignior, for
 he cannot hold of himself.

The passage in the Touchstone (c. 23, 439) is a copy of what fell from Manwood in *Brett v. Rigden*,¹ and is confined to escheat. Mr. Preston's addition, "For the tenancy is extinguished in the seigniori," may be correct; but it does not appear to me to bear upon the present question.

Upon the whole, I am of opinion that the lands in question did not pass by the will, and that the appeal should be dismissed. But considering how much difference of opinion has been expressed on the abstruse points in the case, simple in itself as it seems, there should, I think, be no costs.

THE LORD CHANCELLOR (LORD WESTBURY) put the question, and the judgment of the Court below was affirmed.

Lords' Journals, 20th July, 1864.

1864. July 8, 11, 12, 28.

MARIA CHINNERY (a Lunatic, by her next Friend), *Appellant*.
EYRE EVANS, *Respondent*.

Limitations, Statute of. Mortgagee. Receiver. Assignment of Outstanding Terms.

Payment of interest on an Irish mortgage made by a receiver appointed under the 11 & 12 Geo. 3, c. 10 (Ir.), over the estates mortgaged, is, within the terms of the 40th section of 3 & 4 Wm. 4, c. 27, payment by "an agent" of the party liable.

The words in the 40th section "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing of an acknowledgment.

M. was possessed of estates in three counties, Cork, Kerry, and Limerick. In 1776 he mortgaged them to F. The interest on the mortgage was not regularly paid, and, on a petition presented by F., under the 11 & 12 Geo. 3, c. 10 (Ir.), a receiver was appointed. In form, his appointment embraced the three estates; in fact, he never entered into possession of any but the Limerick estate, from which alone he took the money necessary to keep down the interest on the mortgage. M. afterwards (without any knowledge of the matter on

¹ Plow. 343.

the part of F.) sold the Cork and Kerry estates to C., and certain outstanding terms and judgments were assigned and conveyed to a trustee for C. to protect the title. After the lapse of nearly twenty years, since the last payment made by the receiver, F. claimed to have a sale of all the estates included in the original mortgage in order to cover arrears of interest:—

Held, affirming the judgment of the Court below, that the payment by the receiver out of the rents of the Limerick Estate, was a payment which in law must be considered as made by the mortgagor in respect of the mortgage debt, and therefore prevented the Statute of Limitations operating as a bar to the demand as to any of the estates comprised in the mortgage.

The assignment, to a trustee for the purchaser of an estate, of outstanding terms affecting it, and of judgments on which elegits had been issued, does not constitute the purchaser an encumbrancer within the meaning of the 42d section of the 3 & 4 Wm. 4, c. 27, so as to prevent the operation of the statute on the claim of the mortgagee:—

Held, therefore, reversing the judgment of the Court below, that the mortgagee was only entitled to demand six years' arrears of interest up to the filing of his petition in which the holder of the estates sold was, for the first time, made a party to the suit.

IN 1775 Sir Thomas Tilson Deane, Baronet (afterwards * 116 created Lord Muskerry), was seised in fee of certain * estates called Stonefield and Crinallon, in the barony of Muskerry and county of Cork (subject to two jointures of 700*l.* and 800*l.* per annum in favour of his mother), and also of certain other lands called Clydamore and Coomacullen, in the county of Kerry, and of other lands in Limerick. On the 1st January, 1776, he included all those lands in mortgage executed to Grace Freke, to secure a sum of 8000*l.* with interest at the rate of five and one

DATES.

- 1776. 1 January. Mortgage to Grace Freke, of lands in Cork, Kerry, and Limerick.
- 1783. Lands in Kerry sold by Lord Muskerry to Morgell.
- 1784. Mrs. Freke's executors petition for a receiver, — appointment, on this petition, of a receiver over all the estates mentioned in the mortgage.
- 1789. Demise of the lands in Cork by Lord Muskerry to Chinnery.
- 1790. Assignments to Chinnery of charges created on the Cork and Kerry estates prior to the mortgage of 1776 (no mention in the sale of 1783, or the demisor of 1789, of the mortgage of 1776).
- 1792. Sale by Morgell to Chinnery of the Kerry estates.
- 1853. Petition by Mrs. Freke's representatives, who knew nothing of the sale of the lands of Cork and Kerry, against Lord Muskerry, for sale of the lands comprised in the mortgage of 1776. Sale ordered.
- 1856. Amended and supplemental petition, — all parties then brought before the Court.

half per cent. per annum. This mortgage was at once registered.

Mrs. Freke died in the year 1782, having by her will appointed the money due on the mortgage between her two sons, W. E. and R. E. Freke, and her two daughters Anne and Kitty, the latter the wife of George Putland.

In 1783 the lands in Kerry were sold by Lord Muskerry * to one Crosbie Morgell without any reference to the mortgage, and the conveyances on this sale were duly registered. *117

In May, 1784, a petition was presented by the executors of Mrs. Freke to the Court of Exchequer in equity setting forth the mortgage, and specifically naming the lands in the three counties, and then stating that there was a sum of 720*l.* due for interest on the said mortgage up to the 1st January, 1784, and praying for the appointment of a receiver over the mortgaged lands.¹ Cause was shown against this petition on behalf of Lord Muskerry, and on the 9th July, 1784, the order for a receiver over the lands described in the petition was made absolute. Walter Sweetman was appointed receiver, and by an order of the 19th September, 1784, "the several tenants of the lands and premises in the petition mentioned," were ordered to pay their rents to him. No accounts were ever rendered by Mr. Sweetman, and in 1800 Mr. Mounsell was appointed to succeed him, and filed his first account in November, 1801, from which, and from subsequent accounts, it appeared that the receiver, though in form appointed over all the mortgaged lands, had only in reality been in receipt of the rents from the lands of the county of Limerick, which did not fully cover the amount of interest, but left an annually increasing arrear.

* Other receivers were afterwards appointed, but no rents *118 of the lands in Cork or Kerry appeared ever to have been received on account of the interest on this mortgage debt.

In January, 1789, Lord Muskerry demised the lands in Cork to

¹ This petition was presented under the 11 & 12 Geo. 3, c. 10 (Ir.), by which it is enacted, "that in all cases where one and a half year's interest shall be due, a Court of equity, upon application in manner hereinafter mentioned, shall appoint a receiver to receive such parts of the rents of the mortgaged premises as shall be sufficient to pay such arrears of interest, and also the accruing interest of the said mortgage money from time to time, one half year when the other shall become due, until the whole of such interest due on the mortgage shall be discharged."

Broderick Chinnery (to whom he was largely indebted), in fee farm. This deed was immediately registered.

By deeds bearing date in April, 1789, and November and December, 1790, Broderick Chinnery (who had at that time become the purchaser of the Kerry estate, and also of the Cork estate previously demised to him), obtained an assignment to a trustee on his behalf, of the jointure charges of Lady Deane, and of certain judgments, and an outstanding term given to secure the arrears of jointure affecting the lands in the counties of Cork and Kerry, and of the rents on the leases previously made to himself by Lord Muskerry. There was a covenant to keep on foot and unsatisfied a mortgage of 1699, and four judgments thereon, on three of which elegits had been issued at dates between 1779 and 1789, the object stated being to protect the interests of Chinnery. There were the usual covenants for title, but there was no reference whatever to the mortgage of 1776.

Broderick Chinnery, who was afterwards created a baronet, continued in uninterrupted possession of these lands till his death in May, 1808, and no payment on account of the mortgage of 1776 nor any acknowledgment of it was ever made by him. His son succeeded to the property, was found a lunatic in 1833, and from that time until his death in 1858 his estates were under the control of a receiver appointed by the Court of Chancery.

In July, 1853, a petition was presented on behalf of Anne *119 Dorothea Putland, the person interested under the mortgage, alleging that large arrears of interest were due, and praying for a sale of the lands comprised in the mortgage of 1776, which lands were described as in the possession of Lord Muskerry. This petition was not served either on Chinnery or on his committee or receiver. In July, 1853, an order *Nisi* was made directing a sale of all the lands comprised in the mortgage of 1776. This order was in November, 1853, made absolute on a consent signed by Mr. Howe, the solicitor for Lord Muskerry.

In May, 1855, Mrs. Putland presented an amended petition, correcting some mistakes as to the amount of sums due on the mortgage, and stating that the receiver appointed under the Mortgage Act (11 Geo. 3, c. 10, Ir.) continued over the Limerick lands, and that no release of the Cork and Kerry lands had been discovered, and that none such existed. Another petition, amended and supplemental, was presented in January, 1856, introducing

for the first time the representative of Sir Broderick Chinnery, stating the purchases made by him, the lunacy of his representative, the appointment of the Rev. Sir Nicholas Chinnery as committee of the lunatic's estate, and alleging that the rents due out of the Cork and Kerry estates had never been applied in satisfaction of the interest due on the mortgage. Cause was shown against an order for sale of these estates on the ground of the claim being barred by the Statute of Limitations; but that was disallowed by order of 2d July, 1856, and an order was made by Mr. Commissioner Hargreave on 22d July, directing a reference to ascertain the sum due on the mortgage, so as to determine what should be done with regard to the sale, and to certain leases made by Sir Broderick Chinnery of the lands which he claimed to have purchased from Lord Muskerry, but which were included in the mortgage of 1776.

* The interest originally vested in Grace Freke passed, * 120 on the death of Mrs. Putland, to the respondent. Various proceedings were taken, and in March, 1859, the lunatic's committee filed a discharge insisting that as against the appellant no more than six years' interest prior to the filing of the amended petition in January, 1856, in which the representative of Sir Broderick Chinnery was first made a party, could be recovered. The cause was heard in May, 1859, before Judge Hargreave in the Landed Estates Court; and on the 13th May he made an order declaring that the respondent was entitled to recover the principal and interest due on the mortgage from the year 1784, after crediting the payments made by the receiver, first, by a sale of the Limerick estate, second, for any deficiency, though exceeding six years before the supplemental petition by a sale of the Cork estate, and, thirdly, for any deficiency still remaining after the sale of these estates by a sale of the Kerry estate, but so as not to levy out of the Kerry estate more than six years' interest prior to the supplemental petition. The distinction in favour of the Kerry estate proceeded on the ground that that had been sold to Morgell in 1783, before the appointment of a receiver, and that Morgell had not been made a party to that proceeding.¹ This * order * 121

¹ The following is that part of the judgment of Judge Hargreave which relates to this matter: "It appears to me to be quite clear, that as against Lord Muskerry and his representatives, and as against the lands of which the receiver has been and is in possession, all the arrears of interest, which have remained unsat-

was taken to the Court of Appeal, where, on the 18th November, 1859, it was affirmed.

ified since 1784, can be still recovered in that petition matter, and that the creditor is entitled to retain the receiver until all such interest shall be paid, no matter how long a period might be required for that purpose ; and it follows as a mere matter of course that if the money be raised by a sale of these denominations, no limit can be placed on the amount of interest to be recovered, for it would be idle to suppose that the relative rights of the debtor and creditor could be altered by a mere change in the form of the proceeding. In point of fact, the parties representing the debtor have not raised any question on this point, and as against them the whole demand is unquestionably due.

" I am of opinion, that out of the lands of Clydamore, nothing can be recovered in the petition matter of 1784 and its revivals. It is true that an order was obtained for a receiver over it, but such an order could have no practical effect on the possession of Morgell the purchaser of 1783, as he was not made a respondent to the petition. It may be said that, as the petition would have been made maintainable against him and his lands of Clydamore, if he had been before the Court, it would be competent for the petitioners at any time to make him a party, and bind the lands *ab initio*. Probably this would be so if the proceeding had been in the nature of an adverse suit by bill in equity, but when we consider that the effect of a petition under this statute is merely to displace the possession of the respondent, and to place the petitioner, by his receiver, in the precise position which the respondent occupied when the petition was filed, it is evident, I think, that this petition was not a proceeding calculated to interfere with the possession of the purchaser, or a proceeding on which any contested questions could be raised or decided ; I therefore consider that there was no effective suit to recover interest out of Clydamore until the second petition was filed in this Court, and I must hold, that the principal and six years' interest prior to that date are all that can be recovered out of this townland.

" Stonefield and Crinallow are differently circumstanced. The petition of 1784 brought before the Court the proper owner of these lands, but it was practically inoperative in consequence of the existence of prior encumbrances which were being enforced against these denominations. It would have been impossible, in this petition matter, to deal with these prior circumstances in any manner even to the extent of taking an account of what was due on foot of them, and in short against them (represented by B. Chinnery) the proceeding of 1784 was quite abortive. It is contended, however, on the part of the mortgagee, that the case is thus brought within the proviso in the 42d section, that there was a prior encumbrancer in possession from 1790, or thereabouts, to the present time, and that consequently he is entitled, out of these lands, to interest during that interval. It is contended in reply, that the possession of Chinnery and his successors in title is not as creditors, but as purchasers and owners. Now, as between Lord Muskerry on the one hand, and Chinnery on the other, no doubt the possession of the latter must be regarded as the possession of an owner ; but as between Chinnery and parties having demands prior to his purchase, but subsequent to his charges, I apprehend that B. Chinnery's possession can only be regarded as the

This was an appeal against the orders of the 16th December, 1858, and the 18th November, 1859.

* *The Attorney-General (Sir R. Palmer) and Mr. Hob-* *122
house, for the appellant. — The decree of the Court below is wrong in declaring the respondent entitled, under the mortgage of 1776, to payment out of the Cork and Kerry estates. The first question is whether, supposing the appellant to take those estates from and under Lord Muskerry, the Statute of Limitations is prevented from running as to them by *any payment *123 made by a receiver, who only dealt with the rents of the Limerick estate. The next question is, whether, supposing the respondent entitled to come at all on these estates in Cork and Kerry, his claim is not confined as to the estates in Cork, as well as those in Kerry, to six years previous to the date of his supplemental petition.

The case of *Doe d. Palmer v. Eyre*¹ was relied on in the Court below, but that cannot affect this case, for there the remedy sought by the mortgagee was on a payment made within twenty years by the mortgagor, and the person to be affected was only a

possession of a creditor, for it is only in that capacity that he could retain the possession against the mortgagee.

"It is, however, further insisted, that Chinnery's demands might have been paid off long ago if he was in as a creditor, and that in order to come within the exception, the suit by the mortgagee should have been instituted within one year after the prior creditor could be put out of possession.

"This, however, is not the language of the statute, and to construe it so would operate very harshly against the subsequent creditor, who is not in privity with the prior creditor, and has no means of knowing what is due to him. Such a construction would bar the puisne creditor of his rights, if he permitted the prior creditor to remain a single year in possession after he was paid off; and yet, if he filed a bill before the prior creditor was fully paid, he would be liable to all the costs. In the case of *Drought v. Jones*,² Lord Plunket says: 'Even admitting that he (the puisne creditor) might file a bill, I am not bound to give to a section creating a statutable bar a stringent construction which does not necessarily follow from the words.' On the whole, I think that the period of a year is given, to be computed from the time when the possession is actually abandoned by, or recovered from, the prior creditor, and, in the present case, that possession has not yet been recovered; and I am not prepared to say that it can as yet be recovered from Chinnery's representatives by the puisne mortgagee. It may well be that something is yet due on these old charges, the amount of which was large."

¹ 17 Q. B. 366.

² 2 Irish Eq. 307.

tenant on sufferance ; here the appellant is a *bond fide* purchaser for value. Against him the mere acknowledgment of the mortgagor, or payment made by him (supposing any such payment to have been made in this case, which is denied) can have no effect. The 7 Wm. 4, and 1 Vict. c. 28, gives no new right to the mortgagee, except so far as it enables him to enforce, for the recovery of the land itself, the same title which, under the 3 & 4 Wm. 4, c. 27, he might enforce for the recovery of money charged upon the land. Under the 40th section of the earlier statute, the respondent here would have been barred. There has not been here any payment or acknowledgment in writing, signed by the person liable to pay, such as will prevent the operation of the statute in barring the claim. The only person who can make an effectual acknowledgment for such a purpose is he by whom the money is payable, or his agent. That has not been done here ; a stranger cannot do it, and a receiver appointed by the Court of Chancery is a stranger for such a purpose. He is not the agent of

* 124 the party over whose estate he is appointed * adversely as a receiver, but is the mere servant of the Court. *Roddam v. Morley*,¹ though not a decision on this statute, but on the 3 & 4 Wm. 4, c. 42, § 5, illustrates this argument. There a specialty was given by a testator, binding himself and his heirs ; his devisee for life paid the interest on the specialty, and such payment was held to keep alive the liability, but that was because the devisee for life was held under the particular form of bond to be a party liable. So in *Toft v. Stephenson*,² the trustees of a purchaser, holding that character under his will, were treated as persons by whom the purchase money was payable, within the meaning of 3 & 4 Wm. 4, c. 27, § 40. But in *Bolding v. Lane*³ an acknowledgment made by a mortgagor himself was not held sufficient to enable the first mortgagee to recover more than six years' interest as against the subsequent mortgagee, for otherwise⁴ " the mortgagor, or his representative, who may have no interest whatever in the lands (for the ultimate equity of redemption may not be worth one shilling), shall be entitled to charge the estate anew, with any amount of arrears of interest as against the second and subsequent mortgagees." The principle thus declared, applies with still greater force to the case of a purchaser for value without notice.

¹ 1 De G. & J. 1.² 1 De G., J. & S. 122.³ 1 De G., M. & G. 28.⁴ 1 De G., J. & S. 132.

But even if the acknowledgment of the mortgagor himself could be deemed sufficient, still the receiver cannot be treated as being his agent or representative for any such purpose. The receiver is the officer of the Court, and is put into receipt of the rents and profits adversely to the mortgagor. This is especially so under the 11 & 12 Geo. 3, c. 10,¹ which is entitled "An Act *to render securities by mortgage more efficient," and *125 which authorises the appointment of a receiver on a petition presented to the Court, complaining that there has been default in the payment of interest for one year and a half, and specially directs in what manner he shall discharge the duties of his office. [THE LORD CHANCELLOR. — Suppose an action and a judgment and execution thereon, would payment by the sheriff be a payment within the statute?] It would not. As Lord Cranworth said in *Toft v. Stephenson*,² the payment must be made by "a person who unless he pays will lose his land." The sheriff is not such a person.

The intention of the statute, that long delay in enforcing rights shall operate as a bar to them, is shown by the 28th section, which bars the right of the mortgagor himself as against the mortgagee himself, to redeem after twenty years' possession by the mortgagee. It is impossible to suppose that the Legislature should have imposed such a restriction in that case, and yet have allowed the mortgagor, by making an acknowledgment or a payment either by himself or an agent, or, as in this case, by somebody who was not the mortgagor's agent, but was in possession adversely to him, to continue in favour of a mortgagee who had neglected to enforce his rights, a liability against the estate, in the hands of a purchaser, without notice.

But supposing the mortgagee here entitled to claim any thing, he cannot claim against the Cork estate more than six years' interest, to be calculated previous to the filing of the bill of 1856. The appellant is said to have been in possession of the Cork estate as an encumbrancer, but he was not so. He was in possession of the Cork as * well as of the Kerry estates, in the char- * 126 acter of a purchaser only. The encumbrances were only got in according to the usual practice to protect his title ; but that fact did not constitute his possession that of an encumbrancer, so as to give a title on that account to the mortgagee to recover long ar-

¹ See ante, p. 117.

² 1 De G., M. & G. 28, 40.

rears of interest. The purchaser of the Cork estates, like the purchaser of the Kerry estates, was entitled to be called into Court before he could be made liable to the interest on this mortgage, of which he had no notice. He was not so called into Court until 1856, and the same principle which exempted the Kerry estates from liability to more than six years' interest, ought to exempt the Cork estates from any greater liability. The possession of a creditor under an *elegit* is not a possession of an encumbrancer, or an adverse possession as to a mortgagee, under the statute. Here Chinnery was only in possession in the character of a purchaser for value, without notice. But even if that should not be deemed to be the case, the mortgagee, under such circumstances as exist here, cannot recover more than six years' interest, *Du Vigier v. Lee*,¹ and in that case Vice-Chancellor Wigram explained what was the construction put by the Court of Queen's Bench in *Doe v. Williams*,² upon the 3 & 4 Wm. 4, c. 27. He said,³ that it was thereby shown to be "doubtful whether a mortgagee who abstained from entering on a mortgaged estate for twenty-one years after it became forfeited, would not be barred of his right of entry, although the interest had been regularly paid during the whole of that period." In that case he was expressly directing his attention to the two statutes, 3 & 4 Wm. 4, c. 27, and c. 42. Here the mortgagee did so abstain, and must be affected by the consequences of his own act.

* 127 * *Mr. Rolt and Sir H. Cairns*, for the respondent. — All the three estates here are equally liable under the mortgage, and under the appointment of the receiver. There is no question made as to the Limerick estate; and it is submitted that there is in law no distinction between the liability of that and the other estates.

The appellant is, it is true, a purchaser, but the correspondence between the parties [it was referred to fully] shows that Chinnery was well aware of all the pecuniary difficulties of Lord Muskerry, and before the purchase of 1789, knew that a receiver had been appointed over the estates. A mortgagee has a perfect legal title; he is not therefore bound to look after the mortgagor, and watch his dealings with the estate; he may rest on the title he possesses. But the purchaser who is to acquire a title, ought to look to see

¹ 2 Hare, 326.

² 5 A. & E. 291.

³ 2 Hare, 332.

what has been previously done with the estate, and must bear the consequence of any neglect in omitting to do so. Here the mortgagee had the legal title. Morgell had it not, for his vendor, Lord Muskerry, had parted with it. Chinnery, for the same reason, did not obtain it. As to the Kerry estate, he only got what Morgell could give him; and as to the Cork estates, he took no more than Lord Muskerry could then sell. Now as to all the estates, Mrs. Froke's mortgage was registered in 1776, and Morgell's purchase, which occurred but a year before the receiver was appointed, was not registered till 1783. The equal liability of all the three estates is therefore established. In what respect has that liability been since affected?

It is said that the Statute of Limitations bars the claim of the respondent. But that cannot be so; for in 1784 the receiver was appointed over the estates comprised in the mortgage, and they were all the estates now in question. The fact that out of the rents of the *Limerick estate alone the receiver *128 paid the interest on the mortgage, cannot exempt the others from liability. The Statute 3 & 4 Wm. 4, c. 27, affords no ground for setting up such an argument. That statute merely affected the right to recover the money advanced and interest, but did not relate to the right to recover the land itself. The 7 Wm. 4, and 1 Vict. c. 28, supplied that deficiency. The two statutes must be read together, and the words of the later statute throw a light on the meaning of the Legislature in the earlier statute. In the 1 Vict. c. 28, the right to recover the land is expressly given "at any time within twenty years next after the last payment of any part of the principal money or interest derived by such mortgage." Nothing is there said as to the person who is to make the payment, or as to the estate out of which the payment is to be made. Now take the 40th section of the 3 & 4 Wm. 4, c. 27; that section says that no action or suit shall be brought to recover the money secured, but within twenty years, &c., "unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent." In the first place, it is to be observed here that the restriction as to the person is only applied to the giving of the acknowledgment, not to the payment; still it is not contended, as was assumed on the other

side, that payment by a perfect stranger would preserve the liability against the bar of the statute. It is needless to argue that question. The person who made the payment in this case was the agent of the person by whom the money was payable. If several persons are liable, and one of them makes the payment, that affects all the rest. Such was in fact the opinion of * 129 the Court in * *Roddam v. Morley*,¹ which proceeded on the words of section 5 of 3 & 4 Wm. 4, c. 42. [THE LORD CHANCELLOR. — The statement, "I have paid," may involve the admission that I was liable to pay, and in that way the act of payment by one mortgagor keeping alive a charge against several is intelligible; but the notion that if twenty houses are mortgaged, payment of interest due on one of them keeps alive the charge on the rest, startles the mind.] That is not the case here — all the estates are liable — the payment, though made out of one only was made in respect of a liability affecting all.

Enforced payment is equivalent for such a purpose to voluntary payment. A. brings an action against B., and recovers judgment. B. does not pay. A. issues execution, and the sheriff levies on B.'s goods, and pays the proceeds to A. B. is thereby discharged. The effect of the payment is the same as if B. had made it voluntarily; and on this principle it is that the Statute 11 & 12 Geo. 3, c. 10 (Ir.), throughout treats the receiver as the agent of all the parties concerned. The opposite principle could not be admitted. Suppose the receiver to be in possession for more than twenty years, and to pay the interest during that time; if after that time default was made, would the mortgagee be barred because he had not received interest for more than twenty years from the mortgagor? It is clear that the receiver must be treated as the mortgagor's agent for such a purpose. In *Homan v. Andrews*,² it was expressly decided that a payment of principal or interest upon a sum of money charged upon lands, by a person expressly or impliedly authorised to make it, is equivalent to a payment by * 130 the party * liable, so as to prevent the operation of the Statute of Limitations, 3 & 4 Wm. 4, c. 27, § 40.

The judgment of the Court below is correct in making the Cork estate liable to the whole interest not previously satisfied out of the Limerick estate. The appellant had obtained a transfer of outstanding judgments and terms, and was in possession of the Cork

¹ 1 De G. & J. 1.

² 1 Irish Ch. N. S. 106.

estate not merely as a purchaser, but as an encumbrancer. He had a partial though not a complete right against the mortgagee. As a creditor, he could delay, but not defeat, the mortgagee's claim; as a creditor he was in under an *elegit*, and while he was so the claims of the mortgagee could not be enforced against the estate. For the tenant under an *elegit* gets possession of the land only as a chattel interest, *Underhill v. Devereux*.¹ It is therefore for the time protected under the 42d section of the 3 & 4 Wm. 4, c. 27. But he holds not till he has been, but till he may be, satisfied, and the mortgagee is in the condition of the reversioner after the determination of that limited estate. The tenant by *elegit* must account for what he has received beyond the amount of his debt, but in the mean time he is an encumbrancer as against any one else. *Yates v. Hambly*,² *Seton on Decrees*,³ *Price v. Varney*,⁴ *Hyde v. Dallaway*.⁵

The Attorney-General, in reply. — *Bolding v. Lane* must be understood to have decided that an acknowledgment made by a person who has alienated a portion of the land before he made the acknowledgment will not be binding upon that portion. Such a rule is necessary for the protection of *bonâ fide* purchasers.

* THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, *131 the first question which is raised by the present appeal relates to the true construction of the 40th section of the Statute 3 & 4 Wm. c. 27, and also to that of the Statute 7 Wm. 4, c. 27, and 1 Vict. c. 28.

The facts that give rise to the present question, so far as I have stated it, may be expressed in substance in the following way: A mortgage was made in the year 1776, of estates in Ireland, of three denominations, the estates being situated in three several counties, Cork, Limerick, and Kerry. After that mortgage had been made, the mortgagee presented a petition under the Irish Act of the 11 & 12 Geo. 3, c. 10, for the appointment of a receiver of the rents of the mortgaged premises. And accordingly a receiver was appointed by virtue of the provisions of that statute. That receiver entered into possession and into the receipt of the rents of the Limerick estates alone, and from the rents received by

¹ 2 Wms. Saund. 72.

² 2 Atk. 360, 362.

³ Vol. 2, 3d ed. p. 1220.

⁴ 3 B. & C. 733.

⁵ 2 Hare, 528.

him the interest was paid upon the mortgage. The equity of redemption of the estates situated in the counties of Cork and Kerry has been sold, and conveyed by the mortgagor to different persons, the interest continuing to be paid on the mortgage out of the Limerick estates exclusively. And the question is, whether the mortgage still continues to attach to the Cork and Kerry estates.

My Lords, by the 40th section of the 3 & 4 Wm. 4, c. 27, it is enacted that no action or suit or other proceedings (I read the statute shortly) shall be brought to recover any sum of money secured by any mortgage but within twenty-one years next after the present right to recover the same shall have accrued to some person capable of giving a discharge or a release of the same, unless in the mean time some part of the principal money, or some interest upon the mortgage, shall have been paid, or
 * 132 * some acknowledgment of the right, given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent. The words of this section upon which the present question turns are, "unless in the mean time some part of the principal money, or some interest thereon, shall have been paid."

It is contended on the one side, that very great inconvenience indeed would arise if the mortgagee, the existence of whose encumbrance might actually be unknown, should be at liberty, after sixty or seventy years, to make a demand upon the proprietor of the estate originally comprised in the mortgage, but which has been aliened and sold by the mortgagor, perhaps fifty or sixty years before.

On the other hand it is said, with great force, that the inconvenience and injustice to the mortgagee would be very great indeed, if, while continuing to receive from the person liable to pay the interest due upon his mortgage, he was to be deprived, by the act of the parties entitled to the equity of redemption only, of the estates comprised in his mortgage. And I think it plain that considerations of justice and of general convenience and expediency prevail in favour of the latter view. If an estate comprised in a mortgage be sold and conveyed by the mortgagor, whatever may be the form of the conveyance, it must be sold and conveyed in reality subject to the mortgage. If the mortgagee has the legal estate and has the title deeds (which in ordinary cases is the fact), no alienation can be made to a purchaser, except that purchaser

has notice of the mortgage, without great laches or neglect on the part of the purchaser, and great fraud on the part of the mortgagor. I think, therefore, that it is impossible to deprive the mortgagee of the right to resort to any estate which he has not released or given * up, being an estate originally com- * 133 .
prised in his mortgage, so long as that mortgage is legally and regularly kept alive, as it undoubtedly is kept alive by the payment of interest on that mortgage by the person who is liable to pay it.

It was said in argument, that if such an interpretation be given to the statute, it would be possible for a stranger to pay the interest to the mortgagee, and thereby to keep alive the mortgage. It is hardly necessary to deal with such an improbable case as that ; but the answer to it, I think, would be this : that money paid, that is money handed over, by a stranger to the contract under which it was paid, to the individual entitled to receive it, would not have the characteristics and the legal quality of payment. It would be a voluntary render ; a gift or donation, being made by a party not in any respect subject to liability, to the individual who would not be entitled to receive from the person so rendering it any part of the money which it is supposed would be so paid.

I think, therefore, my Lords, that upon the first and general question, it is quite clear that the payment of money to the mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its original integrity and force, with respect to all the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent.

I should have stated that the other statute, the 7 Wm. 4, and 1 Vict. c. 28, was passed for the purpose of preserving in the mortgagee the right to make an entry and bring an ejectment to recover the lands, the language of the 40th section of the former Act being confined to cases of recovery of the money ; the same principle is applicable * to both, and the same *ratio* * 134
decidendi will apply to both sections.

The next point raised in argument was this, whether payment made by the receiver appointed under the statute can be considered as payment made by the person liable to pay, or his agent ; upon the hypothesis that those words in the 40th section of 3 & 4 Wm. 4, c. 27, namely, the words " by the person by whom the same shall be payable, or his agent," apply to both cases, that is to say;

to the case of payments of interest, as well as the case of acknowledgments, which I think they certainly do.

Upon that point I think no reasonable doubt can be entertained, that under the statute the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order, is payment in law by the legal agent of the person liable to pay. I have no doubt, therefore, and I submit to your Lordships, that no reasonable doubt can be entertained as to the mortgagee's security affecting all the lands originally comprised in it, in those three separate counties of Cork, Kerry, and Limerick.

It was proposed in argument, that this view of the statute would interfere with the view taken of the 42d clause of the statute in the case of *Bolding v. Lane*,¹ which was decided by me in the Court of Chancery. But, my Lords, that arises upon a different section, and in reference to a different matter. The case of *Bolding v. Lane* decided this: that if there were several encum-

* 135 * the other, payment made by the mortgagor would not keep alive the right of the first mortgagee to arrears of interest as against the second mortgagee. I think that that does not at all interfere with, but is in perfect harmony with the view which I now suggest to your Lordships to adopt. What was decided in *Bolding v. Lane* was this: that the words, "the person by whom the same is payable, or his agent," were words of such large import and meaning that they would not only comprehend the mortgagor and his personal representatives, upon whom the contract would be personally binding, but would also include the second or the third mortgagee, by whom the principal and interest due to the first mortgagee might with propriety be said to be payable, inasmuch as the estate and right of the second mortgagee was subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgagee upon the payment of the principal and interest. Accordingly, the effect of that acknowledgment in writing given under the 42d section was confined by that judgment, and I think correctly, to the interest of the individual giving that acknowledgment. That, however, refers to a totally different matter from the matter which is now before

¹ 1 De G., J. & S. 122.

your Lordships, and which arises upon the 40th section of the 3 & 4 Wm. 4, and on the other statute to which I have already called your attention.

My Lords, the remaining part of the order appealed from raises a question of quite a different character. It appears that when a part of the mortgaged estates was sold and conveyed away by the mortgagor, namely, the estates in Cork and Kerry, the mortgagee being in possession by the receiver of the Limerick estate alone, or rather of a sufficient part of the rents of the Limerick estate to keep down the interest, there were certain outstanding * charges and encumbrances, a transfer of which was taken *186 from the mortgagor by the purchaser with a view to protect his title and interest in the ordinary manner in which outstanding legal estates or legal charges are transferred, in order to protect the title of the individual beneficially interested. And it was contended that, having regard to the language of the 42d section of the 3 & 4 Wm. 4, it would not be possible to confine the claim of the mortgagee to six years' interest alone, in consequence of the rents being received and possessed by persons entitled to those prior charges and encumbrances, which therefore might be set up as a reason for not holding that the mortgagee was confined to six years' arrears of interest.

The section in question provides that the mortgagee shall only recover arrears of interest for six years, except in a case where a prior mortgagee or other encumbrancer shall have been in possession of the land, or in the receipt of the profits thereof. Thus, inasmuch as no laches could be imputed to the mortgagee, who was unable to gain possession by reason of a prior encumbrancer being in possession, it was thought unjust to limit such mortgagee to six years of arrears; and he was enabled therefore to recover all the arrears which became due during the time that possession of the land charged was held by the prior mortgagee. No doubt the exception is a very just one. But the reason of that exception is this, that when a prior mortgagee was *bonâ fide* in possession, then that possession excluded the subsequent mortgagee from being enabled to recover rents, or to recover lands, or to enter into possession. But it would be gross misapprehension of that section if we were to apply it to a case where the legal holder of a defunct or satisfied charge or encumbrance, or of an existing charge or encumbrance, is * not himself actually in possession, or in *187

receipt of the rents and profits, but where an individual is in that possession, or in that actual receipt, who is entitled by a trust declared in equity to the benefit of that outstanding charge or encumbrance.

Your Lordships are all aware of the various expedients which the unfortunate state of the law with regard to real property has compelled purchasers and mortgagees to resort to, in order to obtain protection in an indirect manner, where that protection ought to be given in a direct manner. Some of these expedients have been the taking of the transfers of outstanding satisfied legal estates, or outstanding charges, with a view to protect the interest of the party in possession. But when that is done, the individual who is actually and *bond fide* in possession, holding under the shelter and cover of the outstanding estate, is of course not entitled to say that his trustee, the owner of the mortgage or encumbrance, is the person in possession, and not himself. In this particular case, therefore, it was not the holder of the charge who was in possession, but it was the individual for whom the holder of that charge was made trustee, by that species of artificial arrangement to which I have already referred. Therefore I must submit to your Lordships that it was quite an unfounded thing to hold, as was done in the Court below, that this land was actually in the possession of a *bond fide* encumbrancer prior to the mortgage of the principal respondent, and that, consequently, he was entitled to claim an unlimited extent of interest, and was not to be confined to six years. I think your Lordships will agree with me, that it was not a case of *bond fide* possession by the encumbrancer within the meaning and interpretation of the statute.

And that therefore, both with regard to the Cork estate
 *138 *and with regard to the Kerry estate, the mortgagee is not entitled to more than six years' arrears of interest. Therefore, my Lords, the order will be partially affirmed and partially reversed, as I submit to your Lordships, to the extent which I have already stated.

LORD CRANWORTH. — My Lords, in this case the first question is, whether the mortgagees have now a right to bring an action to recover the lands in the counties of Cork and Kerry, included in the mortgage of 1st January, 1776; or, rather, whether they would have had such a right if no order for sale had been made by the Encumbered Estates Court.

I think it clear that they would. Ever since July, 1784, they have been in possession, by a receiver under the statute, of that part of the lands comprised in their mortgage which is situate in the county of Limerick. The rents of those lands have been regularly applied by successive receivers towards liquidation of their interest, and by the express provisions of 7 Wm. 4 and 1 Vict. c. 28, any person claiming land as mortgagee may bring an action to recover it at any time within twenty years next after payment of any part of the principal money or interest secured by the mortgage.

It was argued that a payment to be brought within this statute must be a payment by the mortgagor, not by a receiver who is an officer of the Court. But for this argument there is no warrant. The statute says nothing as to the person by whom the payment is to be made.

It is not necessary to say what would be the effect (if such an extraordinary case can be imagined) of a mere stranger, without authority from, or communication with, * the mort- * 139
gagor, regularly paying to the mortgagee his interest for twenty years. It may be that this would not be a payment within the statute. In truth, it could hardly be treated as payment at all; it would be so many gifts regularly made from time to time by a stranger equal in amount to the payments which the mortgagor ought to have made. That which is a mere gift cannot with accuracy be called a payment. But the payments in this case were not payments by a stranger; for though a receiver appointed under the Irish Statute 11 & 12 Geo. 3, c. 10, is an officer of the Court, yet he is certainly no stranger to the mortgagor, but a person paying for him and on his account what he is bound to pay.

I think, therefore, that when the petition was presented to the Encumbered Estates Court the mortgagees had a clear right to recover possession of the land.

This state of the law is calculated (it was said) to occasion great hardship to those who have become purchasers without notice of a mortgage. In this case, I may observe, that it seems very doubtful to me upon the evidence whether there was not distinct notice; but I take the case as if there had been no notice. No doubt this hardship might arise. But the cases in which it could do so are likely to be very rare, and can only happen in consequence of

a purchaser having unfortunately accepted a bad title — of his having been unaware that his vendor was the owner only of an equity of redemption and not of an unencumbered fee simple in possession. The purchaser in such a case suffers from his not having sufficiently ascertained the state of the vendor's title. That a contrary doctrine would be very alarming to mortgagees is obvious ; for, so long as a mortgagee receives his interest regularly, he does not feel himself under any obligation to inquire how his debtor is dealing with the equity of redemption — a matter in which he has no concern.

*140 But on the other question raised by this appeal, I cannot concur with the judgment which has been given below. The Judge of the Landed Estates Court decided that as to the lands in the county of Cork, the mortgagees were entitled to an account of what was due for interest from the date of the mortgage.

The question as to how far back a mortgagee is entitled to recover arrears of interest depends on the 42d section of 3 & 4 Wm. 4, c. 27. It is there enacted that no arrears of interest in respect of any sum of money payable out of land shall be recovered but within six years next after it shall have become due, but with a proviso that where any prior encumbrancer shall have been in possession within one year next before any action or suit brought by a subsequent encumbrancer, then the subsequent encumbrancer may recover all arrears accrued during the possession of the prior encumbrancer.

The Landed Estates Court decided, and the Court of Chancery concurred in the decision, that inasmuch as when Chinnery purchased the Cork lands in 1790, various old encumbrances were assigned to a trustee for him, to protect him and his heirs in their title and possession ; therefore the case was brought within the proviso in the 42d section of the statute. With all deference, I do not concur in this view of the law. What the statute contemplated was the case of an actual possession by an encumbrancer. Now here, so far from there having been possession by an encumbrancer, there has all along been a purchaser in possession ; and the most that can be contended for the purchaser is, that there has been an encumbrancer out of possession, but holding his security for the express purpose of protecting the possession of the

*141 * purchaser. I may observe that the language of the conveyance to Chinnery is this : after assigning the encum-

branches, it says, that it is agreed "that it shall be lawful to continue, and keep on foot and unsatisfied, the said mortgage, and the said four several judgments hereinbefore mentioned, and all proceedings on them respectively had as aforesaid, in order to protect the said Sir James Laurence Cotter and Broderick Chinnery respectively, in their title and possession of all and singular the said hereinbefore granted and re-leased town lands," and so on; showing clearly that the possession was contemplated to be, in point of law as it was in point of fact, the possession of the purchaser. To hold that Chinnery and those who have succeeded him are encumbrancers would be tantamount to treating a large portion of the owners of land as mere encumbrancers, for in a great proportion of purchases a part of the purchase-money is applied in satisfying some existing encumbrance, which, as in the case now before us, is assigned to protect the inheritance.

I concur, therefore, with my noble and learned friend, in thinking that the decree is wrong in giving interest for more than six years before the filing of the supplemental petition in the Encumbered Estates Court. The case must therefore be remitted to the Court of Chancery in Ireland with a declaration to that effect.

LORD WENSLEYDALE. — My Lords, when this case was argued before your Lordships, I had a strong impression that the mortgage on the lands in the counties of Cork and Kerry of the 1st January, 1776, was barred by the Act of Limitations (3 & 4 Wm. 4, c. 27, § 40), and that the receipt of a portion of the interest, enforced through the medium of a receiver of the rents of the Limerick lands, did not answer * the description of a payment * 142 so as to prevent the Statute of Limitations running. Undoubtedly the payment mentioned in Lord Tenterden's Act, 9 Geo. 4, c. 13, which is made to supersede the necessity of a written memorandum to take the case out of the Statute of Limitations, is a voluntary payment, on account of a larger sum then due, so as to be on a different footing from a mere parol promise; a promise vouched by an actual payment on account.

But subsequent consideration, confirmed by the opinions of my two noble and learned friends, the Lord Chancellor and Lord Cranworth, has satisfied me that my first impression was incorrect. A receipt of interest on a mortgage, simple possession of the subject matter by an act of ownership, is enough; and the

receipt of the interest from one estate out of three, all subject to the same mortgage, is enough to keep it alive as to all. The receipt by an officer, by order of the Court, as receiver of the rents of the Limerick estate, operates as a part payment of the interest on all the three mortgaged estates, those of Cork and Kerry as well as Limerick. In that respect, therefore, I agree with my noble and learned friends, and the Court below.

I agree also in the view that they have taken of the other important question. I think this is not the case of a mortgagee in possession, but of a purchaser. The case does not fall within the principle which affects a subsequent mortgagee, who has been prevented receiving any interest by the prior mortgagee receiving the whole. Here the proper interest is only for six years past. I agree, therefore, entirely in the views which have been so clearly and distinctly expressed by my two noble and learned friends.

Ordered, that the order of the Court of Appeal in
* 143 * Chancery in Ireland, on the 16th day of December, 1858,
be affirmed. And it was declared, that, with regard to the Cork estate, the mortgagee is not entitled to more than six years' arrears of interest before the filing of the supplemental petition in the Encumbered Estates Court in Ireland. It is therefore ordered, that so much of the said order of the 18th of November, 1859, as is inconsistent with the declaration above mentioned, be reversed, and in all other respects be affirmed. And the cause was remitted, &c. with this declaration.

Lords' Journals, 28th July, 1864.

PARKER v. TOOTAL.

1865. February 15, 16.

JAMES PARKER (Devisee of Barrow), *Appellant*.EDWARD TOOTAL, *Respondent*.

Will. Implication. Life Estate. "First Son severally and successively." Estate Tail.

Implication may arise from an elliptical form of expression, which necessarily involves and implies something else, or from a form of gift which cannot be rendered effectual, or a direction to do something, which direction cannot be obeyed without implying something else.

Where, therefore, a will gave to T. an "estate for life, with remainder to the first son of the body of T. lawfully begotten, severally and successively in tail male," the words "and other sons" were introduced in order to prevent the words "severally, &c.," from being in effect struck out of the will, and T. was held to take an estate tail by implication.

Words in a will indicative of a class must be taken to denote the class as it was constituted at the date of the will, or at the death of the testator.

Where, therefore, there was a gift (after the happening of certain events) amongst "my daughters and their children," the child of a daughter who had died before the date of the will was held not to be entitled to a share of the property thus devised.

A testator named Chorlton had two sons, Richard and James. *Richard had a *144 a son, Thomas, and died. Some years afterwards James married; and just before the birth of James's son the testator made his will, and died about two months after the birth of this son. By his will the testator devised "unto my grandson Thomas Chorlton, son of the late Richard Chorlton, all that, &c., for his own use during his natural life, with remainder to the first son of the body of the said Thomas Chorlton lawfully begotten, severally and successively in tail male of the name of Chorlton; and for want of such lawful issue of that name, either by my said grandson Thomas Chorlton or my said son James Chorlton, then I give, &c. amongst my daughters and their children," &c. The grandson Thomas entered, and while in possession suffered a recovery; he survived both his uncle James and James's son: —

Held, that taking all the words of the gift together, there was, by implication, an estate tail in the grandson Thomas, and that the recovery barred all right of ultimate succession in the daughters.

THIS was an action of ejectment brought by John Barrow (of whom the plaintiff in error is the devisee) against the defendant in error, to recover a share of a freehold estate called the "Weaste," at Pendleton, in the county of Lancaster. The whole estate had formerly been the property of Thomas Chorlton, here-

inafter called the testator. At the trial at Liverpool, at the Summer Assizes of 1859, a verdict was entered by consent for the defendant, subject to a special case.

The testator made his will on the 5th September, 1799, and died in December of that year. He devised to executors and trustees a freehold estate of inheritance for a term of ten years in trust to pay debts and legacies, then to testator's wife for life; and then the will went on thus: "And immediately after the death or decease of my said wife, I give unto my grandson Thomas Chorlton, son of the late Richard Chorlton, all that my estate where I now live, and all that other estate and premises thereto belonging situate in

Pendleton aforesaid, called or known by the name of Weaste
 * 145 estate, for his own use * during his natural life, with remainder to the first son of the body of the said Thomas Chorlton, lawfully begotten, severally and successively in tail male of the name of Chorlton; and for want of such lawful issue of that name, either by my said grandson Thomas Chorlton, or my son James Chorlton, then I give and devise the said estate where I now live and the Weaste estate amongst my daughters and their children, share and share alike, to hold unto them, his, her, or their heirs for ever, as tenants in common, but not as joint tenants."

Richard Chorlton, the testator's eldest son, had died long before the date of the will, but had left a son, Thomas, who was the first devisee; Thomas was not then married. James Chorlton was the second and only other son of the testator; he was married, and had a son born between the date of the will and the death of the testator. James died in 1804, and his son, the only child he ever had, died in 1825, while Thomas, the first devisee, was still alive. As to Thomas, the case stated that "Thomas Chorlton, the grandson of the testator mentioned in the will, and who was the only son of Richard Chorlton, who survived his father (there having been two other sons who died in their father's lifetime, infants), survived the testator, and was his heir at law, and died in the month of October, 1838, without having had any child, unless a
 child or children who died in infancy before his death."¹

* 146 In 1810, Thomas being then in possession of the estate, *suf-

¹ In the course of the argument the Lord Chancellor noticed the defectiveness of this statement, and it was then agreed that it should be taken as a fact that there was no son of Thomas at the time the recovery was suffered, and that he had not had any son who had attained maturity.

ferred a recovery, and subsequently executed a conveyance, under which the defendant claimed.

On the death of Thomas, in 1838, without a child, it was alleged that the daughters succeeded to the property under the terms of the will.¹ There were six daughters, and all of them, except the third, were married, and had male issue before the date of the will. The second, * Anne, married, and died in 1796, * 147 leaving John Barrow, her eldest son, who, in 1838, claimed his mother's share as her heir at law. He brought an action of ejectment against the defendant, which was tried at the Liverpool Assizes, when a special case was agreed on. It was argued before the Court of Exchequer, and judgment given for the defendant. On error to the Exchequer Chamber that judgment was affirmed.²

¹ In 1812 the question on the construction of the will came before the Court of Chancery (*Chorlton v. Craven*), on a bill for specific performance of a contract of purchase; and a case was sent to the Court of King's Bench, from which a certificate was returned that the vendor, Thomas Chorlton, could make a good title in fee simple to the estate. This certificate was confirmed by Lord Eldon. This case, as then heard, is not reported from either Court. In 1823 the construction of the will again became the subject of discussion, and then in the Court of Exchequer in equity. It was heard on exception to the Master's Report, and was argued by Mr. Preston and Mr. Duckworth in support of the exception, which affirmed, "First, that the vendor could not make a good title, because Thomas Chorlton did not take an estate in fee tail under the will, but only an estate for life; secondly, that the remainders over in this case were not contingent, and therefore not barred by the recovery; lastly, that a purchaser could not be compelled to take a title dependent, as this was, on a nice and difficult question of law, on the construction of an ambiguous will." Mr. Scriven was heard in support of the Master's Report, and Lord Chief Baron Richards took time to consider the case. He afterwards delivered judgment; but as he was then suffering from severe indisposition, said: "I am sorry to be obliged to confine myself to the simple declaration of my opinion that the exception must be overruled, and the report confirmed. We cannot, I think, read this will without seeing that it was evidently the intention of the testator to give to Thomas Chorlton a much larger estate than he would take under the construction which those who support the exception contend for: and I am of opinion that he took such an estate as enabled him to make a good title to the fee, by the means which he has adopted for that purpose." *Rushton v. Craven*, 12 Price, 599. In *Mellish v. Mellish*, 2 B. & C. 524, and 3 Dowl. & R. 808, these decisions are referred to, but at that time it is thought probable that the report in 12 Price had not been printed, for it is not mentioned.

² The counsel for the defendant in error were not called on, the Court considering that, after the decision of three Courts, and after the matter had remained undisturbed for above thirty years, no tribunal but the highest Court of the realm ought to interfere with the previous decisions. 7 H. & N. 962, 968.

to the case of payments of interest, as well as the case of acknowledgments, which I think they certainly do.

Upon that point I think no reasonable doubt can be entertained, that under the statute the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order, is payment in law by the legal agent of the person liable to pay. I have no doubt, therefore, and I submit to your Lordships, that no reasonable doubt can be entertained as to the mortgagee's security affecting all the lands originally comprised in it, in those three separate counties of Cork, Kerry, and Limerick.

It was proposed in argument, that this view of the statute would interfere with the view taken of the 42d clause of the statute in the case of *Bolding v. Lane*,¹ which was decided by me in the Court of Chancery. But, my Lords, that arises upon a different section, and in reference to a different matter. The case of *Bolding v. Lane* decided this: that if there were several encum-

brances upon the same land, ranking in a series one after
 *135 * the other, payment made by the mortgagor would not

keep alive the right of the first mortgagee to arrears of interest as against the second mortgagee. I think that that does not at all interfere with, but is in perfect harmony with the view which I now suggest to your Lordships to adopt. What was decided in *Bolding v. Lane* was this: that the words, "the person by whom the same is payable, or his agent," were words of such large import and meaning that they would not only comprehend the mortgagor and his personal representatives, upon whom the contract would be personally binding, but would also include the second or the third mortgagee, by whom the principal and interest due to the first mortgagee might with propriety be said to be payable, inasmuch as the estate and right of the second mortgagee was subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgagee upon the payment of the principal and interest. Accordingly, the effect of that acknowledgment in writing given under the 42d section was confined by that judgment, and I think correctly, to the interest of the individual giving that acknowledgment. That, however, refers to a totally different matter from the matter which is now before

¹ 1 De G., J. & S. 122.

your Lordships, and which arises upon the 40th section of the 3 & 4 Wm. 4, and on the other statute to which I have already called your attention.

My Lords, the remaining part of the order appealed from raises a question of quite a different character. It appears that when a part of the mortgaged estates was sold and conveyed away by the mortgagor, namely, the estates in Cork and Kerry, the mortgagee being in possession by the receiver of the Limerick estate alone, or rather of a sufficient part of the rents of the Limerick estate to keep down the interest, there were certain outstanding * charges and encumbrances, a transfer of which was taken * 136 from the mortgagor by the purchaser with a view to protect his title and interest in the ordinary manner in which outstanding legal estates or legal charges are transferred, in order to protect the title of the individual beneficially interested. And it was contended that, having regard to the language of the 42d section of the 3 & 4 Wm. 4, it would not be possible to confine the claim of the mortgagee to six years' interest alone, in consequence of the rents being received and possessed by persons entitled to those prior charges and encumbrances, which therefore might be set up as a reason for not holding that the mortgagee was confined to six years' arrears of interest.

The section in question provides that the mortgagee shall only recover arrears of interest for six years, except in a case where a prior mortgagee or other encumbrancer shall have been in possession of the land, or in the receipt of the profits thereof. Thus, inasmuch as no laches could be imputed to the mortgagee, who was unable to gain possession by reason of a prior encumbrancer being in possession, it was thought unjust to limit such mortgagee to six years of arrears, and he was enabled therefore to recover all the arrears which became due during the time that possession of the land charged was held by the prior mortgagee. No doubt the exception is a very just one. But the reason of that exception is this, that when a prior mortgagee was *bonâ fide* in possession, then that possession excluded the subsequent mortgagee from being enabled to recover rents, or to recover lands, or to enter into possession. But it would be gross misapprehension of that section if we were to apply it to a case where the legal holder of a defunct or satisfied charge or encumbrance, or of an existing charge or encumbrance, is * not himself actually in possession, or in * 137

ried while James had a son, and it was probable that that son would survive. An estate tail in the sons of James, whose child was about to be born when the will was made, and was born shortly afterwards, and some time before the testator's death, is therefore naturally to be implied, for otherwise daughters of Thomas would take the estate in exclusion of the son as well as of the daughters of the testator, a result that cannot be presumed to have been intended by him. This was a special limitation to the first sons of James being of the name of Chorlton, as in *Evans v. Astley*.¹ This case is still stronger than that of *Tenny v. Agar*;² the devise over is not an executory devise, but a remainder limited after successive estates; and here, as there, the intent is apparent that the devise over shall not take effect till after failure of the issue of the two sons, but that it should then take effect, and that is the only construction consistent with the whole will taken together.

Sir H. Cairns and *Mr. Lewin*, for the defendant in error.—First, there is, according to the true construction of the will, an estate in tail male in the grandson Thomas, either immediately or in remainder after estates, by purchase, to his son or sons. Secondly, there is no estate tail which can be implied in James * 151 or his sons, and every estate * which follows the life estate of Thomas, if there is such, is a contingent remainder, and was destroyed by the recovery. It cannot be conceded that the cases cited have any application here, without implying that there would be an estate, not in the sons of James, but in James himself in tail male, by force of the words “for want of such lawful issue of that name.” But if such an implication could be raised with respect to James, the words would be equally effective for the same purpose with respect to Thomas. It is clear that “first son” meant to describe the male issue of Thomas, for otherwise the words “severally and successively” could have no meaning whatever.

Independently of the general question of the construction of the will, there is one matter which is decisive against the plaintiff. He claims in ejectment under a remainder limited to daughters, from one of whom he is a descendant. That daughter died in 1796, not only before the death of the testator, but before the date

¹ 3 Burr. 1570, 1581.

² 12 East, 253.

of the will. According to all the principles of construction, a testator making a will in 1799, and making a gift of real estate to "my daughters," must mean the daughters which he then had, or at least those who might be alive at the time of his death, and the children of a daughter who died long before the date of the will would not take any share. Then as to the will itself. The gift is to Thomas and his son, and then follow the words "severally and successively," showing that sons were meant; "sons" is a word forming a class. The word "son" is an apt word of limitation, not merely pointing to the first male of the existing generation, but to his male lineal descendants. *Robinson v. Robinson*; ¹ *Mellish v. Mellish*; ² *Garrod v. Garrod*; ³ *Doe d. Jones v. Davies*; ⁴ *Raggett v. Beaty*.⁵ In *Robinson v. Robinson*,⁶ the devise was to H. "for life and no longer," taking the name of R., and to such son as he should have, taking the name; and in default of such issue, remainder over. This was held to create an estate in H. in tail male. The first gift being in terms for life, did not prevent the enlarging operation of the succeeding words. The other cases followed the same principle of construction. The words "severally and successively" here point to the series of those who were to take, and the first son designated not merely the first son in the first generation, but the first son of every generation. According to all the authorities, Thomas must be treated as having taken an estate in tail male. While he had male issue the estate was not to go over. That showed the intent of the testator. The result of the cases is well expressed in Jarman.⁷ The

¹ 2 Vez. Sen. 225.

⁴ 4 B. & Ad. 43.

² 2 B. & C. 520.

⁵ 5 Bing. 243.

³ 2 B. & Ad. 87.

⁶ 2 Vez. Sen. 225.

⁷ 2 Jarman on Wills, 456, 3d ed. "These cases would seem to lay down the sound and reasonable rule, that where an estate is devised to a person for life, with remainder to his children, or to his sons and daughters, with a devise over on the failure of the issue of the devisee for life, and the latter words are held to create an estate tail in the parent (but which they will do only under a will which is subject to the old law), the devise to the children, sons or daughters, is not unnecessarily or wantonly sacrificed to this object; but the parent, i. e. the devisee for life, takes an estate tail in remainder, expectant on the determination of the prior estates of his children, sons or daughters as the case may be. And there seems to be no reason why this construction should not prevail as well where the prior devise to the children's sons or daughters conveys estates tail in remainder, expectant on the parent's life estate, as where these devisees take estates for life, unless the cases of *Bamfield v. Popham* (1 P. Wms. 54), and *Black-*

* 153 case of *Baker v. * Tucker*¹ does not apply here, except so far as to show that in doubtful cases a referential construction may be adopted. Nor does *Blackborn v. Edgley*,² the report of which was there explained and corrected, carry the matter beyond this point. But *Doe d. Bean v. Halley*³ is in point. There the devise was to A. for life, remainder to his eldest son, and the heirs of such eldest son, and in default of issue male, from A. to B., and A., notwithstanding the express gift to him of an estate for life, was held to take an estate for life, remainder to his eldest son in tail, remainder to himself in tail. That is the counterpart of the case here. So in *Doe d. Gallini v. Gallini*,⁴ where, under words similar to these, although much more complicated with other devises, the son was held to take an estate for life, with remainder in tail to his children, and remainder to himself in tail. Here it is clear that such lawful issue must mean such lawful issue, male issue, as before mentioned.

If the devise over was a contingent remainder, limited after an estate tail, it was barred by the recovery; as an executory devise it would be void, *Fetherston v. Fetherston*; ⁵ *Cole v. Sewell*; ⁶ and Butler's note to Fearn.⁷ *Lanesborough v. Fox*; ⁸ *Gardiner v. Shelden*; ⁹ * *Ranelagh v. Ranelagh*; ¹⁰ *Neighbour v. Thurlow*; ¹¹ and *Barnet v. Barnet*,¹² were also cited.

Mr. Manisty replied. — The objection to the claimant's title on account of the death of Mrs. Barrow before the date of the will, is answered by an expression in another part of the will, which shows the testator's intention. He gave a sum of money "to my daughter Ann Barrow's children," that being the same sum which he gave to each of his other "daughters or their children." It is

born v. Edgley (1 P. Wms. 600), should be considered as conclusive authorities against such a construction. Indeed, in the case of *Doe v. Gallini*, the children of the testator's sons and daughters were held to take estates tail in the first instance, with remainders in tail to the sons and daughters; as, notwithstanding the apparent restriction of the estates of such issue to life estates, they were held to take estates tail by force of the word 'issue' as a word of limitation, strongly aided by the context."

¹ 3 H. L. Cas. 106.

² 1 P. Wms. 600.

³ 8 T. R. 5.

⁴ 5 B. & Ad. 621; 3 A. & E. 340.

⁵ 3 Clark & F. 67, 2 Huds. & B. 320.

⁶ 4 Drury & War. 1, 2 H. L. Cas. 186.

⁷ Cont. Rem. 522, n. (m).

⁸ Cas. temp. Talb. 262.

⁹ Freem. 11.

¹⁰ 12 Beav. 200.

¹¹ 28 Beav. 33.

¹² 29 Beav. 239.

clear, therefore, that he intended to put the children of Ann Barrow in the place of their mother. He meant all his daughters or the sons of his daughters to succeed in default of the male issue of James. The words of the will are sufficient here to give to the child of Ann Barrow the share of the mother. *Tytherleigh v. Harbin*¹ is exactly in point here.

THE LORD CHANCELLOR (LORD WESTBURY).—My Lords, your Lordships are now called upon to undertake a task of great difficulty. You are asked by the appellant to arrive at a conclusion which will have the effect of subverting the opinion upon the construction of this difficult will, given by the Court of King's Bench about the year 1811, and confirmed by Lord Eldon shortly afterwards, probably in the year 1812, and which was adhered to by the Lord Chief Baron of the Court of Exchequer, after a long and elaborate argument, in the year 1823. I need not point out to your Lordships that the interval of time which has elapsed since the year 1812 has of course given rise to the belief on the * part of the holders of the estate, that they have a *155 right to rely with certainty upon the title derived from that judgment. At the same time the law admits of the present claim being made by the appellant, and your Lordships, with caution, must now undertake the task of determining whether in your judgment those former decisions, by which notwithstanding the lapse of time you are not bound, are or are not right and correct expositions of the meaning of the will.

It is necessary, in the first place, to state shortly that the will you have to construe was made in the year 1799. The testator, Thomas Chorlton, appears to have had an eldest son, Richard Chorlton, who had died previously to the date of the will, leaving a son, Thomas.² Thomas, therefore, the grandson of the testator, was, at the time of the making of the will, and at the death of the testator, his heir at law. The testator appears also to have had a second son of the name of James. Thomas, at the date of the will, was of the age of about twenty-one years, and was unmarried. James, his uncle, the second son of the testator, was married, and it was probable that he would have issue born to him within a very short time after the date when this will was made. In that state of things, the testator devised the property

¹ 6 Sim. 329.

² See ante, p. 146, n.

now in question unto his grandson Thomas, for life, in a definite form of limitation: and after that grant follow the words which create the controversy your Lordships have now to determine. First of all, the words are, "With remainder to the first son of the body of the said Thomas Chorlton, lawfully begotten, severally and successively in tail male, of the name of Chorlton. The sentence is defective. We are familiar, no doubt, with sentences of a similar description, * namely, the ordinary mode of expressing gifts in tail to the first and other sons of any particular individual.

The first question is, whether the words "to the first son," must be taken as defective, or elliptic, by force of the subsequent words "severally and successively in tail male." Because the latter words are not applicable to the first son, if the words "the first son" be taken as the complete expression of the intention, and as a designation of one individual alone. I think it clear that upon the whole formula of the words that we find here, you must read the words "first son" as equivalent to "first and other sons"; or otherwise you will refuse to give effect to, and will, in reality strike out of the will, the subsequent words, "severally and successively in tail male." That I apprehend to be reasonably clear.

If that be so, the next point which demands the attention of your Lordships is, what is the effect of the words following, "for want of such lawful issue of that name"? The difficulty that here arises is to determine whether those words are no more than the ordinary words intended to introduce the next estate, and to be expressive only of the fact of the former estates having either failed of taking effect at all, or having come to their natural expiration. Upon this there is very considerable controversy. It is contended on the part of the appellant that the referential construction, as it is called, has now been firmly established; and he insists therefore that those words, "for want of such lawful issue of that name," must be limited entirely to the event of there having been no such lawful issue, or of the lawful issue comprehended within the antecedent words having ceased to exist.

On the other hand it is contended by the respondent with great force, that these words indicate a special intention * on the part of the testator to provide for all the male issue of his loins bearing his name. And the case is put

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of this contingency : suppose the testator to have had a son who died in his lifetime, leaving a son, and then to have made a will in which he used limitations such as these, "to my first and other sons," that form of limitation would not comprehend or include his grandson, the son of the deceased son ; and yet it is palpable from the form of expression used to indicate the gift over, that it was the testator's desire that all the issue of his name should be provided for. The respondent, therefore, insists that if that case had occurred, and was now presented for argument, the Court would arrive at the conclusion that the referential word "such" was entirely satisfied by the antecedent words "male issue," and that the words "for want of such lawful issue," would in that case be read in favour of the intent, as if they were "for want of male lawful issue."

My Lords, if that be the interpretation which the words reasonably bear, the effect would be to annex to the special limitation "to the first and other sons in tail," a general expression that the estate should not go over until there was a complete failure of male lawful issue of Thomas. Consequently in the case put, of Thomas having had a son who, before the date of the will, predeceased him, leaving a grandson, the estate would not go over until failure of issue male of that grandson ; and in order to include the grandson, and his male issue (and so effectuate the intent of the testator), we must, according to established rules of interpretation, give to Thomas himself, by necessary inference, an estate in tail male, by way of remainder, after the limitation to the first and other sons of Thomas.

This was, I think, the mode of interpretation adopted
 * by the Court of King's Bench, and approved of by Lord *158
 Eldon. Unhappily it seems that this case was argued in the Court of King's Bench after Lord Ellenborough had arrived at the unfortunate conclusion that, the certificates sent by the Courts of Common Law to the Court of Chancery need not contain any reasons for the decision. It is, perhaps, an unfounded but still a current story, that Lord Eldon was much in the habit of criticising the language of the reasons that accompanied those certificates, and on that account, it is said, the Court of King's Bench formed that determination. I advert to that story only for the purpose of observing, that as it was confessedly Lord Eldon's habit to scrutinize, with much accuracy, the certificates sent by

the Courts of Common Law, it is not likely that he would have acquiesced in the conclusion of the Court of King's Bench in the case of this will, unless he had been satisfied that that was its fair interpretation. Nay further, he must not only have been satisfied that it was a reasonable interpretation, but that it was the proper interpretation, because he confirmed the certificate for the purpose of forcing the purchaser to take the title ; and, having regard to the established rules of a Court of equity which will not compel a purchaser to take a doubtful title, the fact that Lord Eldon decreed specific performance is a sufficient *indicium* of his satisfaction with the construction which had been put upon the will.

Undoubtedly it is a difficult thing, after this long interval of time, to arrive at any different interpretation, but nevertheless it is your Lordships' duty not to accept any construction merely upon the credit due to high authority, unless you conscientiously believe it to be the construction which most accords with the words, and best effectuates the intention of the testator.

* 159 * But, my Lords, there is very much to be said in favour of that construction, because it gives effect to every word of the will. Although you give to the word "such," as I have already observed, a limited operation as a word of reference, this construction, by which you are enabled to give to Thomas an estate in tail male in remainder, after a limitation to his first and other sons in tail male, also enables you to give, by parity of reasoning, the same estate tail in remainder to James. And then we get the ultimate remainder to the daughters, as a vested remainder expectant and consequential upon the series of other remainders, and the whole scheme of the will is completed ; and the intention of the testator is thus put beyond the power of being defeated, except in the manner indeed in which it was defeated, namely, that at that time of day contingent remainders not being protected, if there were no trustees to preserve them, the limitation being to the first and other sons of Thomas, the life estate of Thomas, together with the remainder given to him in tail, enabled him, there being no son then born to him, to suffer a good recovery and to create a good title, by preventing the possibility of the remainders to his first and other sons ever subsequently taking effect. I am very much inclined therefore to recommend your Lordships to say that this reasonable interpretation (although it does not carry the principle of referential construction to the full extent to which it

has been carried by subsequent cases which have more fully developed it), is nevertheless a construction that satisfies every word, and I think makes the whole of the will agree in every part, and supplies an interpretation which accounts for the antecedent decisions, and which therefore, being recommended by those decisions, comes with great weight to the minds of your Lordships.

* But if that is not the construction, my Lords, then * 160 the only other construction which the subsequent words admit of would be this: If we take the words, "for want of such lawful issue of that name," to be merely words, as I have said, introductory of the remainder, and expressive only of the expiration of the entailed estate, then the words that follow, "either by my grandson Thomas Chorlton, or my son James Chorlton," can be expressive only of this; in default of such issue male by my son Thomas as would be entitled to take under the antecedent limitations of this my will, and also in default of such issue male of my son James as would be entitled to take under similar limitations, to his first and other sons, then to my daughters. And if the words that are here found are expanded and unfolded in the manner which I have thus expressed, the question arises whether the elliptical form of expression being thus amplified, that amplified form of expression would or would not give to the first and other sons of James estates correspondent to those which are limited to the first and other sons of Thomas by necessary implication; or whether they would be expressive only of a contingent event which must happen, in addition to the failure of the antecedent limitations, before the remainder to the daughters could take effect. Consequently the remainder to the daughters would not be a vested remainder expectant upon the determination of the estates limited to the first and other sons of Thomas, but would be a remainder that would arise and take effect only in the event of there also happening, before the limitations to the sons of Thomas came to an end, the further contingency of there being no issue male of James.

This, my Lords, is the chief difficulty; whether these words shall be satisfied by the expression of that contingency * simply, or whether the words shall also receive this * 161 further operation of being not merely expressive of the contingency, but of giving estates also to the first and other sons of

James, correspondent to those already expressly given to the first and other sons of Thomas.

My Lords, upon this particular point I quite agree with some remarks made at the bar, that the older cases are no longer to be regarded as safe guides in such an inquiry. Great latitude was undoubtedly given by them to the doctrine of implication. Implication may be founded upon two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction.

Two examples will illustrate sufficiently the application of these general propositions. If I give to my heir at law an estate from and after the death of A. B., the form of that expression indicates that my heir at law shall not have the enjoyment of that estate until the life of A. B. shall have come to an end. But if the estate is not to go to my heir at law during that interval, and no other holder is provided for it, it must either escheat or go to A. B. during his life; and Courts of justice have adopted the latter conclusion. Another implication frequently arises in this way: If I give to A. B. and C. D. as tenants in common in tail, and direct that if A. B. and C. D. shall die without issue, the estate shall remain to E.; this gift over, from the very form of expression, is not to take effect until both A. B. and C. D. are dead

*162 *without issue; and if one dies without issue, living the other, there must be implied a remainder from the one to the other.

The question is, whether any rule of implication is applicable to the case before us. I cannot find in the words used by the testator any thing like a plain indication of an intent that the first and other sons of James were to take estates in tail male, correspondent to those already given to the first and other sons of Thomas. Neither can I find that such an implication is necessary in order to support the gift over. Neither can I find that the language of the gift over does in terms, or in the form of words, involve the necessity of the gift over awaiting the termination of the estates which, by the supposed implication, are to be raised in

the first and other sons of James. Confining myself, therefore, to the wholesome rule of interpretation, that although we construe the language in conformity with the intention, yet it must be an intention which we are able to collect from the language that the testator has used ; and remembering that if that language is satisfied by going to a certain extent, there is no obligation to go further, then, if the language here, speaking of the sons of Thomas, is satisfied by the expression of a contingency, there seems to be no warranty for pushing it further than that particular interpretation which is sufficient to satisfy the words. I cannot, therefore, my Lords, bring myself to advise your Lordships that you ought, from the words which the testator has used, to raise estates tail by implication in the first and other sons of James, and thereby support the title of the appellant. I put out of consideration for the moment the circumstance that this interpretation does not appear to have suggested itself to the great legal minds who seem again and again to have attended to this case.

*That ought not to be conclusive upon the matter. At *163 the same time it is a circumstance which probably confirms the conclusion that we are disposed to arrive at, upon the principles which I have imperfectly stated, that there is no such expression of intent to give estates to the first and other sons of James as would warrant us, on the foundation of what is written in the will, in implying these estates, and reading them into this will.

My Lords, if that be so, namely, that whether you regard the estate taken by Thomas the grandson as an estate for life only, without remainder to himself in tail, or whether you regard him as having a remainder to himself in tail, which coalesced with his life estate, and supported his recovery, the title of the respondent is good ; for in the one case the estate to the daughters would be a contingent remainder destroyed by the operation of the recovery, and in the other case the estate to the daughters would be a vested remainder ; yet it would be expectant upon estates tail in remainder in Thomas and James, and the recovery of Thomas the grandson would be equally good.

I am afraid that I have detained your Lordships at unnecessary length upon this matter ; but after the arguments which we have heard at the bar, it would scarcely have been consistent with the position of your Lordships if you had avoided expressing any

opinion upon this particular part of the case. But I cannot but feel that the whole of that part of the case to which I have, perhaps unnecessarily, given so much time, is one not needed for the determination of this question.

The title claimed by the present appellant arises in this manner. The testator had several daughters, six in number. One of them,

Ann Barrow, died in the year 1796, three years before the
 *164 date of the will, which was * not made until the year 1799.

She left children, and under one of those children the appellant claims a small and divided portion of the estate in question. Now it is necessary for the appellant to bring himself within the compass of the gift which is made of the remainder to the daughters, and that gift is "amongst my daughters and their children, share and share alike." My Lords, whenever there are words used in a will indicative of a class, the words must be taken to denote the class as it is constituted, either at the date of the will or at the death of the testator. It is impossible to include in the class any individuals except those who are found to come within the description of the class, at either one or the other of these two periods. Now it is clear that the words "amongst my daughters" express a gift to a class, and that Ann Barrow was neither one of that class at the date of the will, for she was dead, nor of course at the subsequent time, at the death of the testator.

If that be so, we come to the words "and their children." The appellant contends that the words "and their children" must not be limited to the children of the persons constituting the class in immediate connection with which those words are found; but he reads them as if they were thus written, "amongst my daughters, and the children of my daughters." Your Lordships will observe that he would then give to the second words, "my daughters," in the second place where they occur in that sentence, a different effect and extent of meaning from that belonging to those words where they first occur. For it would then, according to the appellant, run thus, "amongst my daughters" (that is those now living), "and the children of my daughters"; and under the words "my daughters" as secondly used, being identical with the first, he would include a different set of
 *165 *individuals from those comprehended by the first. That interpretation cannot, I think, by possibility be adopted. The word "their" connects the children with the persons that

constitute the class ; “ amongst my daughters and the children of them,” and the “ them ” of necessity indicates and includes the persons included under the words “ my daughters ” then living.

Some cases were cited at the bar by the appellant in support of this distributive and extended construction ; but upon examination I think there is no one of them which approximates at all to the form of this expression, and each of them is found to depend upon a different form of words indicating a greater latitude of meaning, and clearly expressive of an intention to comprehend all the children, whether they were children of persons living at the time of the death of the testator, or whether they were children of persons coming within a certain description who had predeceased the testator. I believe it to be a perfectly clear principle, that it is impossible to carry words used in immediate connection with a class beyond the extent of the class itself.

My Lords, that would suffice for the determination of this case, and it is a pity that it was not more attended to by the appellant before these proceedings were instituted ; for I feel satisfied that if the argument had been taken upon that point alone, the Court below must have arrived at the conclusion that the appellant was an individual who did not come within the description of the class contained in the gift, and was therefore incompetent to maintain the action of ejectment.

Upon all those grounds, therefore, I must move your Lordships that the decision of the Court below ought to be affirmed.

* LORD CRANWORTH. — My Lords, with regard to this * 166 particular case, I am clearly of opinion with my noble and learned friend on the Woolsack (and indeed it struck me so in the early portion of the discussion), that the last point to which his Lordship has adverted is conclusive upon this matter. I cannot help suspecting that the testator did mean to include the children of the deceased daughters ; but I think, if we were to include them, we should not be construing his will, but making a new will for him which we think would be more consistent with what were his probable intentions. I think it to be clear that a gift “ to my daughters ” (which, if left without any allusion to children, would only have meant daughters who were living at the death, or, at least, at the date of the will, which were pretty nearly contemporaneous events in this case), would mean only those who were then

living, not those who had predeceased him. And when the testator says, "amongst my daughters and their children, share and share alike," he must mean the children of those whom he had previously described "as daughters."

That point, therefore, is conclusive against the present appellant. And it may be thought that that being conclusive against him, it is unnecessary to say any thing upon the construction of a will which has been so frequently considered in the different Courts upon previous occasions. But I do not think it unnecessary to do so ; in the first place, after the elaborate argument that we have heard at the bar on both sides ; and, in the second place, considering the numerous occasions on which this will has been brought before the Courts : first before the Court of King's Bench, afterwards before Lord Chancellor Eldon, and afterwards again before Lord Chief

Baron Richards, and that they have all expressed an opinion
 * 167 * upon it. On that mere ground I think it would be somewhat disrespectful to those high authorities, and to the parties who have brought this case before your Lordships' House, to pass this point by, without making some observations upon it. But there is another reason which appears to me to make it the bounden duty of your Lordships to express your opinion, and it is this. Although much more than twenty years have now elapsed since the death of the tenant for life, for he died in the year 1838, I do not, from an examination of the pedigree, see quite clearly that there may not be other persons, not coming within the category of descendants of the deceased daughters, who might afterwards set up a claim ; and it is fit therefore that your Lordships should know that the grounds upon which you are proceeding are not confined to that which has reference solely to the position of the present appellant.

Now, my Lords, upon that subject it is impossible to say that there is not very great difficulty and doubt. Indeed, it would be absurd and presumptuous to express such an opinion after the great discussion which this case has undergone, and the difficulties which have been from time to time felt upon it. I do not at all hesitate to express my perfect conviction that the appellant is right in saying that Thomas the grandson took an estate for life only ; an estate for life only, at least in the first instance. Neither have I the least hesitation in concurring with him in saying, that although the expression "with remainder to the first son of the

body of the said Thomas Chorlton, lawfully begotten, severally and successively in tail male of the name of Chorlton," is a very imperfect expression, still it affords an inference that we not only may but must make, that what was meant was the first and every other son successively in *tail male. Therefore * 168 Thomas Chorlton became tenant for life with remainder to his first and other sons in tail male.

Then, my Lords, it is to be observed that after that devise, there is no gift to any one till you come to the daughters, unless by implication (to which I will presently advert), for the will goes on to say, "and for want of such lawful issue of that name, either by my said grandson Thomas Chorlton or my son James Chorlton, then I give and devise the said estate amongst my daughters." Taking those words without at all altering or enlarging them, the daughters clearly took only a contingent remainder upon the expiration of the estates in tail male of the sons of Thomas, contingent upon the casualty whether or not at that time there should be a total failure of issue male of Thomas and James. That was clearly a contingent remainder.

But it was very ably argued by Mr. Manisty and Mr. Hardy, that that is a construction which the Judges below ought not to have adopted, and which, if they did adopt, your Lordships ought not to sanction. Inasmuch as the estate was given to the daughters only "for want of such lawful issue of that name," that is the lawful issue of the first and other sons successively of Thomas; and since, further, it was only given over for want of that lawful issue "either by my grandson Thomas Chorlton or my son James Chorlton," Mr. Manisty and Mr. Hardy argued that you must from that infer that the testator meant to give to the children of James the same estates which he had given to the children of Thomas.

Now, my Lords, I confess that that seems to me to be a very violent presumption. I am not fond of raising estates by implication if it can be avoided. It too often happens, I am afraid, that that is a disguised way of *making a will, instead of * 169 interpreting it. But if I do raise estates by implication here, I cannot hesitate to say that the estates that I should raise by implication are estates in remainder in Thomas and in James. It seems to me that if you could suppose that the testator was now living, and could tell what he meant to say, he would say, I do not mean my daughters to take so long as there is any issue male of

Thomas or any issue male of James; not if there is any issue male of James's sons; that was not what he had or could have had in his contemplation. Therefore the implication which I should raise would be that which my Lord Chancellor approved of, namely, an estate tail in remainder in Thomas, with remainder in tail male in James. It was said then that that would be at variance with the rule which has been laid down in modern times, and which no doubt is a very correct rule, that the words "for want of such lawful issue" are to be taken referentially to the issue that has gone before, and that you are never to take them therefore as enlarging the previous estate. Your Lordships will observe that you do not enlarge the previous estate in the mode which that rule of law, as laid down by Jarman, is meant to meet. It is not that your Lordships say that Thomas, instead of his life estate, took an estate enlarged by those words to an estate tail. What your Lordships conclude, if that is to be the interpretation, and if estates are to be raised by implication, is, that the testator meant to say that he gave an estate for life (and for life only, if you please) to Thomas, with remainder to his first and other sons in tail male, and in case of the "want of such lawful issue" (which must mean for want of lawful issue male, for that was the particular sort of issue that he then contemplated), then you do not

*170 enlarge the prior estate, but, for the purpose * of effectuating the intention of the testator, you give that without the giving of which his intention would be defeated, namely an estate tail in remainder to Thomas, with an estate tail in remainder to James, and then with remainder over to the daughters. Whether that is the true interpretation, or whether you are to say that it was to be a contingent remainder, which might be barred by the recovery, the result is exactly the same. I confess that I rather think, upon the authorities, that such an estate tail may be presumed, and that Thomas, therefore, when he suffered the recovery, was a tenant in tail in remainder in possession. His estate consequently enabled him to suffer a recovery, and all the remainders over were barred. If that was not so, then it must be that he was only a tenant for life with remainder to his first and other sons in tail, but with a contingent remainder over, which was equally barred by his recovery. So that *quacumque viâ*, the decision which was arrived at by Lord Eldon in 1812, and by the Court of Exchequer in 1823, was correct.

On these grounds, my Lords, I concur with my noble and learned friend the Lord Chancellor, in thinking that this appeal must be dismissed.

LORD CHELMSFORD. — My Lords, I agree with my noble and learned friends in the conclusion at which they have arrived in favour of the decision of the Court below.

With regard to the point which goes to the title of the plaintiff from his being a descendant of a daughter, who was deceased at the time of the making of the will, I agree with my noble and learned friends that he does not come within the terms of the devise. I was very much struck with the way in which this question was * put by my noble and learned friend on * 171 the Woolsack in the course of the argument. He said: To whom do the words "my daughters" refer? Clearly they can only refer to daughters who were in existence at the date of the will. Then, if that is so, the question as to the words of reference, "their children," must necessarily be confined to them. It seems to me to be impossible, whatever we may conjecture with regard to the intention of the testator, to put any other interpretation upon the words than that which has been suggested by my two noble and learned friends, and which is conclusive against the title of the appellant. This point certainly does not appear to have been hitherto much regarded, if at all, and to have come upon the appellant rather by surprise; and, therefore, I should very much regret it if the House were compelled to come to a conclusion adverse to the appellant upon this point alone. But I agree with my two noble and learned friends with regard to their construction of the will, which construction is equally fatal to the title of the appellant.

My Lords, it appears from the statement which was made by counsel in the argument of the case of *Mellish v. Mellish*, that Lord Eldon and the Court of King's Bench, upon the case submitted to them, came to the conclusion that Thomas Chorlton had an estate tail; and the counsel there adds, that "in the Court of Exchequer last year the Court came to the same result, acting upon the authority of *Robinson v. Robinson*." If that be so, Lord Chief Baron Richards must have been of opinion that the words "first son severally and successively," were words of limitation, and were equivalent to "issue male." Now we have no account

of the grounds upon which the Lord Chancellor and the Court of King's Bench came to the conclusion that there was no
 * 172 estate * tail in Thomas Chorlton, but I think that we must look for that estate tail in other words of the will than those upon which the Lord Chief Baron seems to have relied, because I read the will in the same way as my noble and learned friends have done.

I think, in the first place, that Thomas Chorlton had an estate for life ; then that the words " first son of his body severally and successively in tail male," must mean " first son in order severally and successively," or, in other words, " first and other sons in tail." Therefore if the learned counsel was correct in saying that the Lord Chief Baron decided that there was an estate tail in Thomas Chorlton, upon the authority of the case of *Robinson v. Robinson*, I cannot agree with him in that decision ; and we must look to other words in the will for the estate tail which Lord Eldon and the Court of King's Bench seem to have held to have been in Thomas Chorlton. Now that estate can only be found in the words which precede the limitation to the daughters, namely, in the words " for the want of such lawful issue of that name, either by my said grandson Thomas Chorlton or my son James Chorlton," and the question upon those words would be, whether an estate tail by implication was raised in Thomas Chorlton.

My Lords, the appellant contends that by those words there was no implication of an estate in Thomas Chorlton, but that by the referential word " such " in the sentence " such lawful issue of that name " of James, it must mean first and other sons of James in tail male, and this estate by implication to the first and other sons of James would make the limitations to the daughters a vested remainder ; and consequently that remainder would not be affected by the recovery which was suffered by Thomas
 * 173 Chorlton. It is true that that would have * been a forfeiture of his estate for life ; but the persons entitled in remainder were not bound to take advantage of that forfeiture ; they might wait until a determination of the preceding estates, when they would be entitled to possession.

According to the view which has been taken by my noble and learned friend near me, the question whether there is an estate raised by implication or not, whichever way it is determined, would decide ultimately the case against the appellant, because

supposing there is no implication of an estate in James, the implication would be, that the limitation to the daughters and their children would not take effect until the failure of issue of Thomas and of James; and that therefore would be a contingent remainder, and it would be defeated by the recovery suffered by Thomas Chorlton. But I am disposed to agree with my noble and learned friend, that there really is an implication of an estate. I will take it in the first place an implication of an estate in tail male in James Chorlton. Now if that is so, the limitation to the daughters would be a vested remainder. But if there is, as I think there must be, an implication of an estate tail in James, and an implication also of estate tail in Thomas, then of course that estate tail in Thomas would enable him to suffer a recovery, and to defeat all the limitations.

That there should be an implication of an estate tail in James appears to me to be clear from looking to the mode in which the testator has shown an anxious desire that his estate should always continue in a person bearing the name of Chorlton. Supposing there is no implication of an estate tail in James, as the ultimate limitation is not to take effect until the failure of issue male of James, James might have had descendants for many *generations, and during that time the estate would de- *174 scend to the heir at law, who might not be, and probably would not be, a person bearing the name of Chorlton. Therefore it appears to me, that in order to effectuate the intention of the testator, there must be an estate tail by implication in James. What reason can there be for saying that the very same expressions applicable to Thomas should not also raise an estate tail in him by implication? And circumstances have been stated under which it would have been absolutely necessary, in order to effectuate the complete intention of the testator, that there should be such an estate tail also in Thomas.

Therefore it appears that, whichever way you take it, whether you imply estates tail in Thomas and James or not, the result is equally unfavourable to the appellant. If there are no estates by implication, then, as the ultimate limitation is not to take effect until the failure of the issue male of Thomas and James, it would be a contingent remainder, and would be defeated by a recovery. And if there are estates tail by implication to be raised in Thomas

and in James, then Thomas's estate tail enabled him to suffer a recovery, and to bar the subsequent limitations.

Upon these grounds, therefore, I agree with my noble and learned friends, that the appeal ought to be dismissed.

Judgment affirmed.

Lords' Journals, 17th February, 1865.

1864. July 26, 28, 29. 1865. February 27.

STEPHEN FOX DICKSON, *Plaintiff in Error*.

Her Majesty THE QUEEN, *Defendant in Error*.

Excise. Grocer. Spirit License. 6 Geo. 4, c. 81; 6 & 7 Wm. 4, c. 38.

The 6 & 7 Wm. 4, c. 38 (Ir.), § 3, did not repeal the previous statute, 6 Geo. 4, c. 81, § 2, and the schedule thereto, but all were to be read together. Therefore when the 3d section of the 6 & 7 Wm. 4, c. 38, was itself repealed, the provisions of the 6 Geo. 4, c. 81, still continued, and a person in Ireland, licensed to trade in grocery, and obtaining a spirit license, was liable to the larger duty charged by the earlier statute on a person of that description, as fixed by the schedule to the 2d section of that statute.

THIS was a proceeding in error on a judgment on a petition of right, the object of which was to obtain a return of 16s. 6½d., alleged to have been overpaid in respect of an excise license.

The suppliant being a person duly licensed as "a grocer" in Dublin to "trade in, vend, and sell coffee, tea, cocoa-nuts, chocolate, and pepper," applied to the excise office in Dublin for a license to retail spirits. He occupied a house of the value of 36l. a year, and under these circumstances the sum demanded from him for this license for one quarter of a year was 3l. 0s. 7½d. He refused to pay this sum, alleging that the duty payable for such a license amounted only to 2l. 4s. 1d., but the license being thereon refused, he paid the larger sum under protest, and afterwards took proceedings to recover back the alleged excess. The

duty was imposed by the 6 Geo. 4, c. 81.¹ In 1836 another * Act, 6 & 7 Wm. 4, c. 38, was passed on the subject of * 176 spirit licenses granted to grocers; and the question intended to be argued was, what was the effect of this later statute, particularly with reference to its third section,² upon the Act which originally imposed the duty.

The suppliant first brought an action in the Court of Exchequer in Ireland to recover the difference between the higher and the lower duty. A special verdict was found, and judgment was thereon given for the Crown, by three Barons of the Court of Exchequer, Lord Chief Baron * Brady * 177 dissenting.³ On error, the Court of Exchequer Chamber, by a majority of six to four (Justice Torrens agreeing with the three Barons of the Exchequer), reversed this judg-

¹ The 6 Geo. 4, c. 81, imposed varying duties on retailers of spirits throughout the United Kingdom. The words used in the schedule to the 2d section imposing a low rate of duty were, "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." Then followed duties graduated according to the rental of the retailers' houses. The words used in describing the persons falling within the above exception were these: "Every retailer of spirits in Ireland being duly licensed to trade in, vend, and sell coffee, tea, cocoanuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or premises of such retailer." Such persons were to pay the higher amount of duty.

The 4th section declared that all persons who shall be licensed under this Act to deal in or sell "coffee, tea, &c. shall be deemed grocers within the meaning of the several laws of excise in force in Ireland, at and immediately before the passing of this Act, and shall be entitled to take out the license hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer, subject nevertheless to all and every the regulations contained in the said laws or any of them in respect of grocers retailing spirits, except so far as any of them are repealed or altered by this Act."

² 6 & 7 Wm. 4, c. 38, § 3, enacted that after the passing of that Act, "no person in Ireland who shall be licensed under any Excise Act to sell coffee, &c., nor any person deemed a grocer within the meaning of the laws of excise in Ireland, at the time of the passing of this Act, shall be entitled to take out any license to retail spirits in the house, or on the premises of such retailer, or in any house," &c. within a quarter of a mile thereof, "other than a license to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than in the house or premises of such retailer." And any license granted otherwise was to be null and void.

In 1845 this section of the Act was repealed.

³ *Dickson v. Pape*, 7 Irish Law, 74.

ment.¹ Shortly after this decision, the 3d section of the 6 & 7 Wm. 4, c. 38, was repealed by the 8 & 9 Vict. c. 64. The money was not returned on the reversal, having, before the decision in the Exchequer Chamber in Ireland, been paid over to the Treasury.

In 1860, shortly after the passing of Mr. Bovill's Act relating to proceedings on petitions of right (23 & 24 Vict. c. 34), Mr. Dickson presented a petition of right, claiming the repayment of the 16s. 6½d. This petition of right was heard in the Court of Queen's Bench in Dublin, and judgment given for the petitioner, without argument, on the authority of the ultimate decision in *Dickson v. Pape*. This judgment was then brought before the Court of Exchequer Chamber in England, where it was argued before Lord Chief Justice Erle, Lord Chief Baron Pollock, Justices Williams, Willes, and Keating, and Barons Bramwell and Channell, in June, 1863; and their unanimous judgment in favour of the Crown was delivered by Lord Chief Justice Erle.² The present appeal was then brought.

*178 **Mr. Isaac Butt* (of the Irish bar), for the appellant. —

There have, from time to time, been many changes made by statutes in Ireland with respect to licenses; they have not always been consistent with each other, and that has led to the difficulty in the present case. In 1825, under the Act 6 Geo. 4, c. 81, the law stood thus: A man might get the general retailer's license at the lower duty; if he was already a grocer within the meaning of the Irish Excise Acts, he might obtain a spirit dealer's license, but then he would have to pay the higher duty. But it is to be remarked (though this point has been overlooked in every one of the decisions), that under the 13th section of the 6 Geo. 4, c. 81, he could not get the excise license to sell beer, cider, or perry, by retail, to be consumed on the premises, without first having ob-

¹ *Dickson v. Pape*, 7 Irish Law, 107. About the year 1844 an action was brought by another person, who being already licensed to sell spirits, sought to obtain a grocer's license, but was refused. In that action judgment was given for the defendant, and the judgment was, on error brought, confirmed in the Exchequer Chamber, *M'Kenna v. Pape*, 7 Irish Law, 98. The case was brought up to this House, and judgment (in 1847) affirmed, this House holding that "the Act 6 & 7 Wm. 4, c. 38, § 3, extends to prevent a person who is already a publican from obtaining a license to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person, licensed as a grocer, from carrying on in the same premises the business of a publican." *M'Kenna v. Pape*, 1 H. L. Cas. 6.

² Not reported.

tained a certificate from the magistrates that he was allowed to keep "a common inn, alehouse, or victualling-house," nor could he obtain (section 14) any license for the sale of any spirits, or wines, or mead, by retail, to be consumed on the premises, unless he produced a license for the sale of beer, cider, or perry, by retail, to be consumed on the premises, granted as in that Act before mentioned. It is clear, therefore, that the grocer might disregard the 2d and 4th sections of the 6 Geo. 4, and might go under the 13th section, and get his beer license; and having got it, might then, under the 14th section, get his spirit license. So matters stood till the passing of the 6 & 7 Wm. 4, c. 38, the object of which was to prevent grocers from selling spirits to be consumed on the premises; in other words, to prevent grocers' shops from being made dram shops. The effect of the 3d section of that Act was to give a new form of license, restraining the licensee from selling less than one pint of spirits, and not allowing that pint to be consumed on the premises. The * person licensed * 179 was thus able to sell any quantity of spirits beyond the pint.

A minimum was given by that Act, as a maximum had existed under the 6 Geo. 4. The Statute of Wm. 4 in effect repealed that of the 6 Geo. 4, and substituted a new license for that previously given. When that new license was taken away, as it was by the 8 & 9 Vict., which repealed the 3d section of the 6 & 7 Wm. 4, then the person had to fall back on the general retailer's license in the earlier part of the 2d section of the 6 Geo. 4, c. 81, and so became liable only to the lower duty, which was thereby charged on all retailers of spirits. It is clear that this must be the construction, for in *Boland v. The Commissioners of Excise*,¹ it was decided that "a person who is already a licensed publican is not entitled to a grocer's license"; and *M^r Kenna v. Pape*² decided that after the 6 & 7 Wm. 4, c. 38, a person holding a grocer's license was not entitled to any other license for the sale of spirits but that mentioned in the same statute. That case was brought to this House, and the decision was affirmed,³ so that it may be considered settled that the 6 & 7 Wm. 4, c. 38, § 3, took away the exceptive license created by the 6 Geo. 4, and substituted for it another license. When, therefore, the 3d section of 6 & 7 Wm. 4 was repealed, the general license, not the exceptive license, mentioned in the 6 Geo. 4, c. 81, was the only one that could be said

¹ 2 Irish Law, 287.² 7 Irish Law, 98.³ 1 H. L. Cas. 6.

to exist. That license is to be granted on the payment of the lower duty only. The license substituted by the 6 & 7 Wm. 4 was entirely different from that which previously existed, and was intended to supersede, and did, in fact, supersede the other. By the Statute of Geo. 4, the person licensed could not sell
 * 180 more than two * quarts; but by the Statute 6 & 7 Wm. 4 that maximum was taken away, and a minimum substituted; the spirit was not to be consumed on the premises, and he might sell any quantity, however large, but he must not sell less than one pint. The exceptive license therefore of the Statute of Geo. 4 was wholly abolished; it was not suspended, nor was it conjoined with the new license, so that on the repeal of the third section of the Statute 6 & 7 Wm. 4, it could not, and did not again come into existence.

And it is to be observed that the 6 Geo. 4 imposed the duty on the license there specifically given, and did not impose it on the person who applied for it.

If so, then the higher duty cannot be imposed on the subject by mere implication of law. That would be contrary to the principles of the English law, and is expressly forbidden as to Ireland by the 7th article of the Treaty of Union, and by the construction put upon it in *The Attorney-General v. M^r Kenzie*.¹

The Attorney-General (Sir R. Palmer) and The Solicitor-General (Sir R. P. Collier; Mr. Crompton Hutton was with them), for the Crown. — The 58 Geo. 3, c. 57 (which is still in force), was the first Act that applied to cases of this kind. By that Act, whatever is the form of the license, the dealer cannot sell less than two quarts, and the spirits sold must not be consumed on the premises. Then came the 6 Geo. 4, c. 81, the object of which was to grant new duties. The schedule in that Act did not prescribe the form of the license, and the prohibition for any grocer to sell more than two quarts still remained. The 4th section of that statute
 * 181 showed who were the persons to be deemed grocers, * namely those who were within the meaning of the then existing excise laws, and declared them entitled to take out licenses to sell spirits “not exceeding two quarts at any one time,” to be consumed elsewhere than on the premises; subject, however, to all the regulations contained in the excise laws, “except so far as

¹ 11 Price, 284.

repealed or altered by this Act." Then came the 3 & 4 Wm. 4, c. 68, which was a Police Act, the object of which was to prevent abuses connected with the sale of liquors consumed on the premises. The Act recited the 6 Geo. 4, and the 6th section allowed excise officers to grant, under the provisions of that Act, a license for the sale of beer, cider, and spirits "by retail," to be consumed in the house or elsewhere (when not prohibited by the Justices of the Peace), and section 19 imposed on the person obtaining the license a penalty for any person found tipping in his house after a certain hour. It was found that abuses followed this statute, and then came the 6 & 7 Wm. 4, c. 38, which was likewise a Police Act, and which restrained the person taking out the license from selling any quantity not less than one pint, and to be consumed elsewhere than on the premises. These Acts had nothing to do with the duty payable on the license, but were passed to regulate the conduct of the persons who obtained the license. When, therefore, the 3d section of the Act 6 & 7 Wm. 4 was repealed, the power to grant the licenses described in the 6 Geo. 4 was revived in the way in which it had previously existed, so far as this, that a grocer was capable of having a spirit dealer's license, which he could not have under the 3d section of the 6 & 7 Wm. 4, c. 38, but he could only obtain it under the provisions of the 6 Geo. 4, and was liable to pay the duties thereby imposed. [THE LORD CHANCELLOR. — Suppose there is a tax on a man under a particular description, and then an Act *comes *182 which takes away from him that description, does the tax remain?] Perhaps it would not, but here neither the description of the man nor of the license is taken away. The man is a grocer, and the license is to a grocer to retail spirits. The case of *McKenna v. Pape*¹ has nothing to do with this. It decided that while the 6 & 7 Wm. 4 was in force, a grocer could not take out a publican's license, nor a publican take out a grocer's license. Now that that statute has been repealed, this petitioner comes for a spirit dealer's license; he is a grocer; he asks for the license which the 6 Geo. 4 allows a grocer to obtain, and he must pay for it that amount of duty which that statute imposes.

Mr. Butt, in reply. — It is clear that a grocer can get a beer license; then he may, under that beer license, apply for a license

¹ 1 H. L. Cas. 6.

to sell spirits generally ; and then he will be entitled to it under the general description, and at the lower rate of duty. The applicant may drop his character of grocer, and demand his license in the character of publican only. The case of *M. Kenna v. Pape* is important, as showing that the prohibition of the grocer to hold a publican's license originated with the Statute 6 & 7 Wm. 4, and of course it expired with that statute. The judgment of Lord Cottenham expressly proceeded on the words of that statute alone. In the 6 Geo. 4, the grant of the spirit license to a grocer gives him an additional right to that which he possessed as the bearer of a beer license, but if he did not choose to assume that character he was not bound to do so.

The Act of Union shows that the matter cannot be put
 *183 * upon any implied construction that will make the Irish grocer pay a higher sum for the license than would be paid by the English grocer. The 7th article of the Act of Union prevents that. [THE LORD CHANCELLOR. — That applies to articles, not to persons. A grocer is not an article.] No, but the license is ; and the contention here is as to the license and the duty to be paid in respect of it ; and not as to the man who is to pay it.

1865. February 27.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, the question which has been argued before your Lordships, at considerable but by no means unnecessary length, is one of great nicety, and requiring much care and discrimination in the use of language. The point for your Lordships to decide is, in reality, whether the license granted to the suppliant was properly chargeable with a duty of 3*l.* 0*s.* 7½*d.*, or with a duty of 2*l.* 4*s.* 10*d.* ; and this depends upon the question whether the suppliant was a retailer of spirits within the description contained in the schedule appended to the 2d section of the 6 Geo. 4, c. 81, or whether he was within the exception therein contained, viz. within the words “except retailers of spirits in Ireland after mentioned.” If the suppliant comes within that exception, then he is properly chargeable with the larger duty ; but if he does not, then he is liable only by the general enactment, which is applicable to all retailers of spirits.

The words of the exception, retailers of spirits who are “after mentioned,” speak of the retailers of spirits in Ireland who have obtained grocers' licenses, and are “not selling spirits in any

greater quantity at one time than two quarts," or "any spirits to be consumed in the house or on the premises of such retailers." The argument on behalf of the appellant is, that that is a special and definite *description of the then grocer, who *184 was licensed to retail spirits, and that that specific form of license has been subsequently altered. So that if you hold the duty here imposed to attach to the licensed individual who has received the specific form of license here described, then if it turns out that that specific form of license has been altered, the contention is that as the license is different, the person bearing it becomes different; for if it be imposed upon the person who has received license A, the argument is that it is not applicable to the person who has received license B.

Now undoubtedly we must not lose sight of that great rule in the construction of fiscal laws, that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character, or by virtue of a particular description, no longer fills that character, or answers that description, the duty no longer attaches upon him, and cannot be levied.

The argument, which has been most ingeniously and elaborately conducted on behalf of the defendant, has been this: First of all, it has been said by the appellant that the license, which is here intended to be referred to (I mean by the words I have already read, describing the excepted retailers), is the license which is described in the 4th section of the same statute. That was a license to be granted to grocers, giving them power to retail spirits in any quantity not exceeding two quarts at any one time, to be consumed elsewhere than in the house or on the premises of the retailer. The license according to this rule, if it be granted, would be a license with the maximum of the quantity to be sold, but without the mention of any minimum.

* It appears from a variety of statutes to have been the *185 earnest desire of the Legislature, in a way which the Legislature sometimes adopts, under the notion that an Act of Parliament can render people moral or temperate, it seems to have been the earnest desire of the Legislature to impose every possible difficulty upon the grocers retailing spirits in small quantities. This particular object however seems not to have been quite effected by the statute I am now adverting to, for it failed to fix any thing

like a minimum quantity. It imposed a maximum, but it left the grocer restrained from selling more than two quarts at liberty to retail spirits in small quantities. This point appears to have attracted the attention of the Legislature, and in a subsequent Act, the 6 & 7 Wm. 4, c. 38, and by the 3d section of that statute, it is enacted, in substance, that after the passing of the Act, no grocer (I am substituting the word "grocer" for the larger description which is there given) shall be entitled to take out any license to retail spirits in the house or on the premises of such retailer, &c., other than a license to retail spirits in quantities not less than one pint, and to be consumed elsewhere than in the house or on the premises of the retailer. The former license restrained the grocer from selling more than two quarts; but there was the same restriction with regard to the house and premises where the spirits sold were to be consumed, viz. the quantity was not to be so consumed in the house or on the premises of the retailer. In this subsequent section the Legislature says, You, the retailer, shall not sell less than one pint, and you shall not sell even a pint, to be consumed in the house or on the premises. It expressly enacts that the pint sold is to be consumed elsewhere.

Now the argument on the part of Mr. Butt has been

*186 * this, that this addition made to the license makes it a different license, and that the grocer, who is subjected to the restriction contained in this addition, becomes in reality, *quoad* the selling of spirits, a different person from the person described in the 6 Geo. 4, and that he no longer answers the description of the person who alone is taxed, viz. of the grocer, the retailer of spirits, not selling spirits in any greater quantity at one time than two quarts. It is difficult so to express the matter as to convey to your Lordships' minds with any thing like precision this nice and subtle distinction. It all turns upon this inquiry: Is the limitation of the maximum of the quantity to be sold repealed, expressly or by implication, by the enactment which I have read out of the 3d section of the 6 & 7 Wm. 4? Because if the whole limitation as to the maximum be thereby repealed, then it will be admitted that the individual licensed under the 3d section of the 6 & 7 Wm. 4 has different powers and authorities by his license than those which are contained in the former license; and if he becomes, by virtue of this subsequent statute, a grocer at liberty to sell any quantity of spirits, then he would no longer answer the

description of a grocer not selling (that is, not being at liberty to sell) any greater quantity than two quarts.

But, my Lords, I have laboured in vain to find any reason for holding that these enactments are not perfectly compatible, the one with the other. I have also laboured in vain to find any reason for holding that when you have added to the license a minimum quantity, the licensee can no longer be regarded as answering the description of a grocer not selling (that is, not being licensed to sell) any greater quantity than two quarts. It all turns upon this, whether the two sections may not be most consistently and correctly reconciled by taking the *one as fixing the maximum, and taking the other as *187 superadding the minimum. If the superaddition of the minimum materially affected the description contained in the taxing clause, and rendered it no longer applicable to the person, then the taxing clause could not be acted upon; but if the superaddition of the minimum leaves the licensee still retaining the characteristics which enable him to answer, and exactly to satisfy, the description contained in the taxing clause, then no rule of construction would require your Lordships to hold that the two sections are in any way inconsistent: you could not hold that the former section was in any manner affected or repealed by the latter.

My Lords, that is the conclusion at which I have with some difficulty been able to arrive, and to which I invite the assent of your Lordships. In this view the thing becomes reasonably clear and consistent. The Legislature had imposed a maximum; but it had not imposed a minimum. It apprehended that much danger might arise from the retailing of spirits by grocers in small quantities; and therefore it added a minimum to take away or to obviate that danger; but when it added the minimum, it did not say that the license should be altered; it did not enlarge the capacity of the licensee with regard to quantity; and I think, my Lords, that the licensee still remains at liberty to sell no greater quantity at one time than two quarts, although he was subjected to the further restriction, that of being disabled to retail spirits in glasses, and was obliged to sell a quantity not less than one pint, and that to be taken away from the premises for consumption.

It was contended by Mr. Butt that the construction of the statute would be affected greatly by a consideration of the fact of the practice. He has told your Lordships *that a practice *188

followed upon the Statute of 6 Geo. 4, of a grocer sinking his character as a grocer, and assuming the guise and character of a publican getting a license to sell beer, *eo nomine*, and then presenting himself before the justices for a general license to sell spirits. He desired your Lordships to construe those specific words of the description, "not selling spirits in any greater quantity," &c., as having been used by the Legislature with a prophetic anticipation that might ensue upon the passing of the Act, and as descriptive of the grocers in their two capacities, viz. grocers that obtained grocers' licenses to sell spirits, and grocers that got publicans' licenses to sell spirits. My Lords, I do not think that your Lordships would be at all warranted in giving to the words used in the Act of Parliament, and which are plainly applicable to the existing state of things, the meaning contended for by the learned counsel, that they were used with reference to a possible future state of things. Neither do I think, if the whole of the facts alleged by Mr. Butt were conceded, just for the purpose of the argument, that they would affect the real question upon which the decision of the appeal depends, and which I take to be simply this: Whether the description contained in the schedule to the 2d section of 6 Geo. 4, is, or is not, rendered no longer applicable by the fact of the maximum quantity therein indicated ceasing to be the limit, the *ne plus ultra*, and the license being repealed and another substituted by the 3d section of the Act 6 & 7 Wm. 4? I find nothing to warrant the conclusion that there was such a repeal. I find, in the nature of things, that the two enactments are perfectly consistent, the one having given a maximum without a minimum, and the other having given a minimum without disturbing the maximum. If the antecedent description is, as I * 189 * have said, and it refers only to the minimum, and the maximum remains undisturbed and unaffected, the description is applicable, although the minimum is superadded to the maximum.

My Lords, upon these grounds, although it is impossible to render the matter quite as clear as one would desire to make it, I humbly move your Lordships that the judgment of the Court below be affirmed, and that the appeal be dismissed.

LORD CRANWORTH. — My Lords, I entirely concur with the Lord Chancellor, that the judgment in this case must be for the defend-

ant in error. Before the passing of the Act of Geo. 4, there certainly was no license that limited in its terms the grocer to selling in any quantity, to any extent. The license was a general license that the grocer might obtain then, although by former Acts he could not have done so. Then the Legislature enacted that in spite of his having obtained such a license, it should not be lawful for him to sell at any one time more than two quarts. And so stood the law when the 6th of Geo. 4 was passed. The former duties were then repealed, and among other duties that were imposed, there was one imposed upon "every retailer of spirits in Ireland being duly licensed to trade in, vend, and sell coffee, tea, cocoa-nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts." That was the mode, certainly I think it was rather an inartificial and clumsy mode, of referring to the restriction which the law imposed upon the licensed grocers who obtained a license to sell spirits. There was no such thing before then as a license to sell in any quantity at one time not exceeding two quarts. There had been a license to sell, but * the law then said, although you have * 190 got that license in your character of grocer, you shall not sell more than two quarts.

It was contended by Mr. Butt, that however that might have stood before the passing of the Act, by the 4th section it became necessary that the license should be a license to sell in quantities not exceeding two quarts. That 4th section is very inartificially framed, and in a very blundering manner; because it assumes something to have been said before that had not been said at all. I take the object of the clause to have been this: to remove the doubts that I collect existed before, as to who came within the description of "grocers in Ireland." It enacts that "from and after" a certain day, "all persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers within the meaning of the several laws of the excise in force in Ireland, at and immediately before the passing of this Act." And then it goes on in the passage upon which Mr. Butt seemed to rely, "and shall be entitled to take out the license hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time." There has been no such license "hereinbefore mentioned" in any part of the description of retailers of spirits in Ireland, as authorising persons to sell

spirits not in any greater quantity at one time than two quarts ; there was no license that authorised that, and there was no intention to give any different character to the license.

That being the state of the law, the Publicans Act was passed ; and that had reference not to duties, but to the prevention of intemperance and drunkenness ; and in that Act there were a great many provisions, the intention of which no doubt was to

* 191 make the inhabitants of * that part of the United Kingdom less intemperate ; and among other provisions there is this : that after the passing of that Act, no person in Ireland duly licensed under any Excise Act to deal in or sell coffee, &c., or deemed “ a grocer ” within the meaning of the laws of the excise, should be entitled to take out any license to retail spirits on the premises, or on any premises within one quarter of a mile thereof, “ other than a license to retail spirits in quantities not less at one time than one pint.” What is there to show in the slightest degree that the other restrictions, which existed before, were meant to be affected ? I see nothing of the sort ; and although I agree with what fell from the Lord Chancellor, that we must not strain Acts of Parliament so as to let it be supposed that a duty has been imposed upon the subject which clearly the Legislature has not intended shall be imposed, I think we are not bound — because that is a very well known principle — to shut our eyes to the obvious meaning of the enactment. The former Act fixed a maximum, and said, “ You shall not, although you have a license to sell spirits, sell more under that license than two quarts at any one time ; and now, with a view to promoting temperance in the country, you shall be placed under this restriction — that you shall never sell less than a pint ; that is to say, you shall never sell small quantities to persons who might come into your shop to tittle ; you must sell a quantity that will be larger than could be so consumed.” That, in my opinion, is the obvious intention of the enactment, and I see no reason to suppose that there was any intention to alter or repeal the former enactment, viz. that they were not to sell more at one time than two quarts ; and if so, they remained where they were before, and were liable to the higher rate of duty.

* 192 * LORD WENSLEYDALE. — My Lords, I entirely concur in the observations which have been made by the two noble and learned Lords who have preceded me, and I have nothing to

add to them. I have felt perfectly satisfied with the reasons that were given by Lord Chief Justice Erle in the judgment in the Exchequer Chamber. It has appeared to me that the ultimate result was perfectly clear, and that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

Lords' Journals, 27th February, 1865.

GANN v. THE FREE FISHERS OF WHITSTABLE.

1864. July 13, 14. 1865. March 3.

WILLIAM GANN, *Appellant*.

THE FREE FISHERS OF WHITSTABLE, *Respondents*.¹

Anchorage Dues. Toll. Fishery. Navigation. Port. Arm of the Sea. Haven. Immemorial Usage.

The bed of all tidal navigable rivers and of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, and the right to anchor is a necessary part of the right to navigate. This right never could have been interfered with by grant from the Crown.

The grant therefore of an oyster-bed in an arm of the sea below low-water mark, must have been taken by the grantee, subject to the public right of navigation; and he cannot now, in respect of his ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with the enjoyment of this public right.

A claim of an anchorage due cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due.

Evidence of mere immemorial usage will not support such a claim.

A liability to make compensation for actual injury done to the *oysters by *193 anchoring is not to be confounded with a liability to toll for casting anchor in the soil itself.

The Mayor of Colchester v. Brooke, 7 Q. B. 339, observed upon.

THIS was an appeal brought under the Common Law Procedure Act, 1854.

The action was in debt, the plaintiffs claiming a right to demand

¹ *Gann v. Johnson*, Law Rep. 4 H. L. 265; *Foreman v. Free Fishers of Whitstable*, Law Rep. 4 H. L. 266, 279, et seq.

the sum of 1s. from the defendant as a toll, or anchorage due in respect of his vessel having cast its anchor within the limits of the plaintiffs' free fishery in Whitstable Bay. The defendant pleaded never indebted. The cause was tried before Lord Chief Justice Erle, at Maidstone, during the Spring Assizes of 1861, and the facts proved, as afterwards stated in a case, were these:—

The plaintiffs constitute the company of "the Free Fishers and Dredgers of Whitstable," and claimed to be possessed of a free fishery within the manor of Whitstable. They proved that from 1775 down to the present time they had claimed and received this sum of one shilling from every vessel casting anchor within that portion of the manor of which they were owners, and they claimed it as a customary payment for the use of the soil.

The plaintiffs, in order to prove their title to the fishery, gave in evidence several deeds of lease and release. The first were dated respectively 11th and 12th October, 1791, by which the fee simple of the manor was conveyed to Edward Foad and James Smith in equal moieties.

The conveyance in the release was of "All that the manor of Whitstable, with all and singular the rights, royalties, privileges, members, and appurtenances thereof, in the said county of Kent, and also all Courts, leet Courts, Courts baron, perquisites, and profits of Courts, to the same belonging or in any wise appertaining," and quit-rents, &c. "And also all the fishery of

*194 Whitstable, being * a royalty of fishing or oyster dredging within the said manor, together with all and singular messuages, houses, &c., &c., waters, streams, fishings, fishing-places, water-courses, ponds, pools, moats, Courts, Courts leet, Courts baron, perquisites, profits of Courts and leets, homages, fealties, reliefs, heriots, escheats, fines, issues, amerciements, forfeitures, and all other royalties, franchises, rights, liberties, jurisdictions, &c., &c. whatsoever, to the said manor, royalty and fishery, hereditaments, and premises hereby granted and released, &c., belonging, or in any wise appertaining, or therewith held, used, occupied, or enjoyed, accepted, reputed, taken or known, as part, parcel or member thereof, or to be had, received, perceived, or taken, used, exercised or enjoyed, in, upon, or out of, or arising from, the same manor or lordship, royalty and fishery, &c."

On the 24th and 25th October, 1792, other deeds of lease and release were executed. They recited that "within the limits of

the said manor of Whitstable there is, and for many hundred years now last past hath been, a fishery for the growth and improvement of oysters, extending from the sea beach to a very considerable distance into the sea, and which fishery, during all that time, hath been managed and carried on by, and at the expense of, a certain company of free dredgers called 'the Whitstable Company of Dredgers,' who have held the same from time to time as tenants under the lord of the said manor, and claim to be entitled to hold the same as free fishers, on payment of such annual rents as are hereinafter mentioned."

It was then recited that it was intended a division should be made in the rights of the said manor, royalty, fishery, hereditaments and premises, so that the manor, lands, &c. should be the property of Edward Foad, John Nutt, and Stephen Salisbury, and that all the rights of the lord * of the manor "in *195 the said fishery, and the ground and soil thereof, from the south and southeast sides of the sea beach (which from time to time have been considered as the land boundaries of the said fishery), and in the customary payments usually made to the lord of the said manor, for or on account of the anchorage of any ship or vessel, or for the landing of any goods or merchandise, or for the admission of freemen, or other payments for the regulation of the freemen and fishery, and all other payments whatsoever, at the Water Court of Free Dredgers, there within the jurisdiction of the said manor," &c., were to be the property of Thomas Foord,¹ his heirs and assigns. There were other provisions which it is not necessary to recite, and "the customary payments usually and of right made to the lord of the said manor for and on account of the anchorage of any ship or vessel, or for the landing of merchandise within the said manor," &c. were again mentioned. And "the royalty of fishery or oyster dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, extending as hereinafter is mentioned, and also the customary payments usually and of right made to the lord of the said manor, for or on account of the anchorage of any ship or vessel, &c. within the said manor," were declared to be intended to be limited to the said Thomas Foord in fee. The land division of the manor was vested in fee in Edward Foad, Nutt, and Salis-

¹ In the printed case this name was sometimes spelt Foad, sometimes Foord; in the Act of 1793 it was spelt Foord.

bury ; the royalty of oyster dredging, the payments to the land on account of anchorage of any ship or vessel, or the carting of any goods or merchandise, and repeating all the previous descriptions, were vested in T. Foord, in fee. In the release, the boun-

*196 dary of the oyster *fishery was defined to be "the south and southeast sides of the sea beach at Whitstable aforesaid, as the same is and hereafter shall be thrown up by the sea from time to time."

In 1793 was passed 33 Geo. 3, c. 42, an "Act for incorporating the Company of Free Fishers and Dredgers of Whitstable, in the county of Kent, and for the better ordering and government of the Fishery." It recited that "there hath been, time out of mind, an oyster fishery within the limits of the manor and royalty of Whitstable, extending from the sea beach a very considerable distance into the sea"; that the dredgers had held "the same from time out of mind as tenants of the lord of the said manor and royalty"; that Thomas Foord "hath purchased to him and his heirs, of the lord of the said manor and royalty, the said royalty of fishing or oyster dredging, and the ground and soil of the said fishery * * * and also the customary payments usually and of right made to the lord of the said manor, for or on account of any ship or vessel, or landing of goods or merchandise within the said manor," &c., and that Thomas Foord was willing to convey to the Company of Fishers and Dredgers, &c. all his rights, &c., to effect which the fishers were incorporated, and all the necessary powers for the purchase and sale were given.

By deeds executed in 1793, reciting that E. Foad had purchased the royalty, fishery, &c. on behalf of the Free Dredgers, he conveyed the same to them.

The defendant was the owner of a vessel called the "Amoret," and on the 29th November, 1860, the said vessel cast anchor at Whitstable, on the land covered by water of the sea, and below low-water mark, but the spot where the said vessel so anchored was and is within that portion of the manor of Whitstable

*197 and fishery aforesaid * which is claimed by the plaintiffs under the above deeds, and under the circumstances herein stated, as their soil and freehold. The plaintiffs' oyster-beds extend from the shore for about two miles out to sea, and the said vessel was anchored about half a mile from the shore, upon a part of the land claimed by the said company, but not then used as

oyster-beds. The plaintiffs' claim was for 1s. for anchoring on the soil which they alleged to be theirs.

The defendant at the time in question resided and dwelt within the Cinque Ports, at Whitstable, Whitstable being a part of the port of Faversham, which is a limb of Dover. The said vessel, at the time it anchored as aforesaid, was trading to Whitstable. The defendant gave in evidence a charter granted by Edward IV., to the "barons and good men of the Cinque Ports," and to "the barons and good men of all and singular the ports and towns, of the members of the said Cinque Ports, or to any of them annexed," &c., declaring that "they, their heirs and successors, and whosoever are resident within the ports and members aforesaid, or within any of them, should be quit for ever of toll, pontage, murage, kaiage, peisage, terrage, &c. throughout our whole realm and dominion."¹

The jury found in accordance with the evidence given by the plaintiffs that, from 1775 down to the present time, they, and those under whom they derived title, had from time to time claimed as of right to take and had taken the sum of 1s. from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil.

* A rule *nisi* was obtained to enter a verdict for the de- * 198
fendant or a nonsuit; but was discharged,² liberty being reserved to the defendant to appeal.

A case setting forth the above facts was stated for the purpose of that appeal, and on the hearing, the judgment of the Court below was affirmed.³

This appeal was then brought.

Mr. Prentice and *Mr. Meadows White*, for the appellants. —

¹ There was some argument on this special claim of exemption, in the course of which it was insisted that the words in the charter being "terrage, pontage," &c. the exemption could not apply to "anchorage." And there was also a point raised on the division of the manor into two parts by the deeds of 1792, and likewise upon the consequent necessity of joining the owner of the land part of the manor as a co-plaintiff. But the judgment of the House was rested entirely on the right of a grantee of the Crown to demand anchorage for vessels anchored on his soil, though not within a port or haven.

² 11 C. B. N. S. 387.

³ 13 C. B. N. S. 853.

Assuming that the Crown had the power to grant the soil of the sea, for the purpose of a several fishery, it could not do so except subject to the use and benefit of the people of the realm, and consequently could not grant an anchorage toll in the open sea, for that would interfere with the free navigation of the sea, which "may not be obstructed by nuisances, nor impeached by exactions." Such a toll could only be granted in a port where a *quid pro quo* was given for it, but not where there was none. No toll can be imposed on the subjects by any grant of the Crown, in respect of the navigation of the high seas; nor can any such grant affect the right to anchor anywhere according to the necessities of navigation.¹ These principles are laid down clearly in Hale, *De Jure*

Maris, as published in Hargrave's Tracts:² "Though the
*199 subject may thus have the propriety of a * navigable river, part of a port, yet these cautions are to be added, viz.: —

"1st. That the king hath yet a right of empire or government over it, in reference to the safety of the kingdom and of his customs, it being a member of a port, *prout inferius dicitur*.

"2d. That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions, as shall be shown when we come to consider of ports. For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of a highway is, which, though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people which may not be prejudiced or damnified."

Chitty, *Prerogatives of the Crown*,³ adopts this passage from Hale, and adds, "On the same principles the holder of an exclusive prescriptive right of fishery in public waters enjoys it subservient to the superior and sacred right of the public to use the arm of the sea or river for the purpose of navigation"; and he refers to an anonymous case before Baron Wood at the Durham Assizes in 1808,⁴ where the same doctrine is laid down, in very strong terms. [LORD CHELMSFORD. — That is a very strong case, for Baron Wood was himself very favourable to the prerogative.]

In Hale, *De Jure Maris*, "anchorage" is not even mentioned.

¹ Com. Dig. tit. Prerogative, and tit. Toll, 1 Mod. 104.

² Page 36.

³ C. 8, p. 143.

⁴ 1 Camp. 517, n.

But it is mentioned in the work "De Portibus Maris," where it is said: ¹ "Anchorage, or a prestation or toll for every anchor cast there; and sometimes though *there be no anchor."² *200 And this doth in truth properly and *primâ facie* arise from or in respect of the propriety of the soil, and is an evidence of it. But yet it is not so always, but grows due in respect of the franchise; for many times where the shore of a harbour belongs to a private lord or owner, yet, if at full sea ³ a ship lets fall an anchor upon that place, the king or lord of the port in point of franchise hath usually the anchorage; as I know it hath been used in the harbour of Plymouth, where yet some lords adjacent have the soil of the shore in some places to the low-water mark." Wharton's Law Lexicon and Todd's Johnson, both treat anchorage as only incident to a port; and it is clear that some benefit must be conferred as the consideration for the toll. *Lord Pelham v. Pickersgill*.⁴ *Lord Falmouth v. George*.⁵ In Kent's Commentaries,⁶ the American as founded on the English law is spoken of, and the right of the public to an uninterrupted navigation is declared, even where the soil is in the Crown or in a private individual. And in Angell on Watercourses, referring to Kent's Commentaries, it is said: ⁷ "The public right of navigation seems to have been ever regarded as paramount to the rights of fishery. That is, should an individual in the exercise of the exclusive piscatory right which he has by virtue of riparian ownership, or which he has by *a special grant in those waters, the right *201 to the soil of which is *primâ facie* in the Government, set a seine therein, he can have no redress if he is disturbed by the passage of water craft." He justifies this statement by a consideration of the two rights, and then by the authority of a case of *Post v. Munn*,⁸ where the owner of such a fishery sued for compensa-

¹ Ch. 6, Hargr. Tracts, 74.

² Does not this mean when buoys are laid down, and the vessel does not drop its own anchor, but is, in any way, attached to any one of them, for otherwise it would be the case of a vessel sailing or drifting over the water. The establishment of the buoys would be an instance of the *quid pro quo*.

³ Some remarks were made upon this phrase, "at full sea," as if it implied the sea beyond the limits of a port. It was suggested that the phrase was the equivalent of "*pleine mer*," full tide or high water. The suggestion was adopted by the House.

⁴ 1 T. R. 660. See *Rickards v. Bennett*, 1 B. & C. 223.

⁵ 5 Bing. 286.

⁶ 3 Kent, Com. 414.

⁷ Ch. 13, § 558.

⁸ 1 South. N. J. 61.

tion for injury done to his nets by a vessel when in the ordinary course of navigation, and was held not entitled to recover. Callis¹ asserts that no custom can extend the ownership of a subject farther than the low-water mark. In Comyns's Digest,² it is said that toll cannot be claimed for ships that do not land or unload at the quay, which is confirmed in Bacon's Abridgment.³ [THE LORD CHANCELLOR. — These authorities only go to show that a grant derogating from the public right cannot be good without a *quid pro quo*. Are there authorities to show what would be the consequence of a vessel's anchor carrying away the nets of the owner of a fishery?] The case of *Post v. Munn* in New Jersey, already cited, is an instance of that kind, and the case before Baron Wood, and *The Mayor of Colchester v. Brooke*,⁴ establish that the law is the same in England. In Scotland the same rule appears to exist.⁵ The Crown may grant to a corporation the lands between high and low water marks, but this must be subject to the *jus publicum* of passing and repassing both over the water and the land, and obstructions to such a right may

* 202 * be a nuisance. *The Attorney-General v. Burridge*.⁶ For any toll upon the sea, there must be a good consideration, for "every one hath liberty to come and go upon the sea without impediment," *Warren v. Prideaux*.⁷ A prescription to take toll for passing on a navigable river, through the plaintiff's manor, is bad in law. *Mayor of Nottingham v. Lambert*.⁸ The king cannot charge the subject with an imposition where he has no benefit by it, or a *quid pro quo*; Comyns,⁹ and that was the principle acted on in *The Mayor of Exeter v. Warren*,¹⁰ as it had been in the case of the London wharfs.¹¹ No benefit was secured

¹ On Sewers, 53.

² Tit. Toll (C).

³ Tit. Customs (D).

⁴ 7 Q. B. 339.

⁵ Bell's Principles, where it is said, that navigation is a primary and inalienable right, and section 645, "Navigation is a use for the public, not to be interrupted or encroached on by grant of a ferry or by exercise of any ancient right of ferry." Section 646, "Fishing is a secondary use for which the Crown holds the sea and shore for the public benefit. But it is not unalienable like that of navigation." *Erst. Inst. bk. 1, tit. 8, § 17*. See also Paterson's Fishery Laws of the United Kingdom, 93; and Paterson's Compendium of English and Scotch Law, c. 1.

⁶ 10 Price, 350.

⁷ 1 Mod. 104.

⁸ Willes, 111.

⁹ Com. Dig. Tit. Prærogative (D 48), citing 2 Rol. 272.

¹⁰ 5 Q. B. 773.

¹¹ 1 W. Bl. 581.

here to the navigation by the act or at the cost of the grantees of this oyster fishery.

On the point whether a grant of a fishery was a mere easement, or involved the right to the soil, Scriven on Copyholds, 666; *Scrutton v. Brown*,¹ *The Duke of Somerset v. Fogwell*,² and *Blundell v. Catterall*,³ were cited. An American case of *Den v. Jersey Company*,⁴ was referred to, when it was held that "the soil under the public waters of East New Jersey belongs to the State and not to the proprietors."

Mr. Lush and *Mr. Denman* (*Mr. Needham* was with them), for the respondents. — The question here is what may be claimed by these plaintiffs by prescription. Though the proof of these payments extended only to 1775, the right to demand them was an immemorial right.

* It may be admitted that the right of the Crown in this * 203 case is subject to the public right of navigation; but that is not the right of anchorage, it is the mere right of passing and re-passing. The cases cited do not touch this proposition: There is no plea here that the anchor was dropped from stress of weather. The king has a right to a payment on the letting fall an anchor in a haven, *Tomlins*,⁵ *Wharton*.⁶ That may or not be a portion of the deep sea, or of the sea between high and low water mark. In former times this right could be lawfully granted to a subject.

It cannot be denied that a subject may claim by prescription a property in the sea shore. "The king hath the propriety as well as the jurisdiction of the narrow seas, for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly, regularly, the king hath that propriety in the sea; but a subject hath not, nor indeed cannot have that propriety in the sea, through a whole tract of it that the king hath; because without a regular power he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz. of a *districtus maris*, a place in the sea between such points, or a particular part contiguous to the shore, or of a port, creek, or arm of the sea. These may be possessed

¹ 4 B. & C. 485.

² 5 B. & C. 875.

³ 5 B. & Ald. 268.

⁴ 15 How. U. S. 426.

⁵ Law Dict.

⁶ Law Lexicon.

by a subject, and prescribed in point of interest both of the water, and of the soil itself covered with the water, in such a precinct, for these are maniorable (*sic*), and may be entirely possessed by
 * 204 a subject." Hale.¹ A subject may have the * soil, and the exclusive right to the fishery. The Crown always had the power to derogate from certain public rights. Every grant of a several fishery was such a derogation, yet no one doubts that a several fishery might be claimed by prescription. It is not therefore true, as a proposition of law, that no grant from the Crown in derogation of a public right can be maintained. This particular part of the sea shore was in the Crown, and might have been made the subject of a grant. The passage just quoted from Hale shows that. And what Hale says in the passage relied on by the other side,² does not affect this case. All that he there speaks of is the right of passing and repassing; nothing more. [THE LORD CHANCELLOR. — Does not that include all that is necessary to pass and repass; all that is necessary for free navigation?] It may, but what is voluntary may not be necessary. There is no question in this case as to what may be excused by stress of weather. Here was a voluntary dropping of an anchor on the plaintiff's soil. [LORD CHELMSFORD. — On both sides this must be treated as an act done in the ordinary course of navigation.] This passage, from Hale, shows that anchorage may be taken by the owner of the soil by reason of ownership, within the area of the port or haven, though the vessel does not derive any benefit from the port itself. The definition of
 "anchorage" in Hale³ establishes the same point. A haven⁴
 * 205 is a place naturally created, or artificially * made to protect ships, Hale;⁵ a port is in law a legal creation; the haven

¹ De Jur. Mar. c. 6, Hargr. Tracts, 31.

² De Jur. Mar. ante, p. 198, 199.

³ De Port. Maris, ante, p. 199.

⁴ Some discussion occurring on the derivation of the words "haven" and "harbour," among other things it was suggested that "haven" and "heaven" came from the same root. But "heaven" is derived from a Saxon word nearly similar in sound, which signifies elevated above. "Haven" is derived from words which in Teutonic, Saxon, Welsh, and Danish, sound nearly alike, and signify to hold, to possess, to have. The Scotch law term "haver," one who holds or possesses a particular thing, seems to come from a similar source. Its correlative, "harbour," is from Teutonic and Saxon words, the signification in each being the same, to lodge, to shelter.

⁵ De Port. Mar. c. 2, Hargr. Tracts, 46.

may be part of a port, and this place may be treated as part of the port of Dover, Whitstable belonging to Faversham, which is a limb of Dover. Anchorage dues may be taken if the ship is within the legal limits of the port, without having actually reached it. Southampton and Poole are instances of this kind. A haven is a place where ships receive actual protection by anchoring. This was the case here, so that even assuming consideration to be in all cases necessary as founding a claim to take toll, the consideration existed here.

A legal origin must be assumed in this case, which is to be considered with reference not to what is now law, but to what was the law in former times; in the times when this grant was made. The right to fish in the sea is a public right, but the king could grant a several fishery to any subject; the fishery belonged to the manor. The Crown had formerly the power to do what it cannot do now. It could then create a manor, and grant with it rights of this sort. It has done so in this instance. The Crown here did exercise the rights it possessed; and where such has been the case, those rights have, by reason of their antiquity, been upheld in modern times, though they could not now be exercised for the first time. There is nothing to show that the Crown in former times might not make a grant of this kind, with the power to prevent anchorage in order to protect the oysters. At that time, the benefit to the public from the growth of oysters might be deemed of more importance * than a possible impediment * 206 to the navigation. If the Crown had the power to grant the fishery, it might grant all that was necessary for the protection of the fishery. [THE LORD CHANCELLOR. — That would not establish the claim for anchorage; it would only go to show a right to demand compensation for damage done to the oyster bed.] If there may be compensation, there may be toll in lieu of it. The Crown might have converted a title to a variable compensation into a fixed sum, and that would be good as a toll.

The questions now presented to the House really depend on certain facts, which were not presented to the jury, namely, whether the casting anchor here was a reasonable use of the right of navigation. If, therefore, the judgment of the Court below is interfered with at all, the case ought to be sent to a new trial, to ascertain those facts. The appellant has had the advantage of casting his anchor in the plaintiff's soil, in the plaintiff's haven, at the

termination of his voyage. That was a benefit to him. The respondents are entitled to be compensated for affording it to him. His vessel was trading to Whitstable ; this was a part of Whitstable haven ; having come to the end of his voyage, he anchored here for his own accommodation. Unless any ships are entitled, not only to pass and repass, but to cast anchor anywhere, under all circumstances, and arbitrarily, and by hundreds or thousands, and so entirely to destroy the soil, this claim to anchor in the plaintiff's oyster-bed, in respect simply of the right of navigation, cannot be supported. To restrain the right to a case of necessity would confine the claim strictly within the real purposes of navigation. But that would leave the defendant liable. [THE LORD CHANCELLOR observed upon the defective statement of facts in the case, * 207 adding, " We are the more surprised at this, because * we have seldom listened to arguments with more pleasure, or arguments showing more knowledge of the matter than we have heard in this case."]

Mr. Prentice, in reply. — In the case of a port, the owner of the port is bound to keep it in repair, and may be indicted if he neglects that duty. That is the consideration the *quid pro quo* required by the law. No consideration can be implied as against the public ; here none, in fact, existed ; and Comyns says ¹ " that toll cannot be claimed from those to whom the consideration does not extend."

This is an appeal under the Common Law Procedure Act, and the House need not send the case to a new trial, but may give such judgment as ought to have been given in the Court below.

1865. March 3.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, in consequence of some uncertainty in the statements of the special case, it was admitted by the appellant at the bar of the House, that the payment demanded by the respondents had been made to the lords of the manor of Whitstable from time immemorial, and that the vessel of the appellant cast anchor within the limits of the oyster bed or fishery claimed by the respondents.

The case appears to me to depend on principles which have long been settled.

¹ Com. Dig. tit. Toll (C).

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the * subjects of the realm. The right to anchor is * 208 a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.

The respondents claim to be entitled by royal grant to a portion of the bed and soil (below low-water mark), of the arm of the sea which forms the estuary of the Thames, opposite to the manor of Whitstable in the open sea way, being the high road for the passage of vessels, and they claim a sum of 1s. for every vessel that casts anchor within the precincts of that part of the bed or soil of the river which is claimed by them ; but this claim interferes with the free enjoyment of the right of navigation, subject to which the original grant must be taken to have been made, and it cannot be supported on the ground of ownership of the soil.

If the payment be claimed as an ancient anchorage due, some facts must be shown which either prove or from which it can be inferred, that the soil claimed by the respondents was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made ; but nothing of the kind appears, and no such case can be presumed or inferred from the mere fact of an immemorial payment.¹ No such case is made by * the respondents, and the payment is demanded merely on * 209 the ground of its having been immemorially made to the lords of the manor of Whitstable and their assigns, in respect of the ownership of the site, an ancient oyster-fishery, now vested in the respondents.

¹ On the matter here indicated, another action was brought by the Company of Free Dredgers, it being intended to be shown that there was a service rendered to navigation in respect of which the grant was made. The case is now pending for argument.

Anterior to Magna Charta, by which such grants were prohibited, a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject. The present fishery of the respondents must be taken to have been so granted. And the grant might include a portion of the soil for the purpose of the fishery. But this, like every other grant, whenever made must have been subject to the public right of navigation; and I cannot suppose that the establishment of oyster-beds for the private emolument of the proprietors, could be regarded by the law as an equivalent to the public for the imposition of this tax (at its commencement not inconsiderable) on the right of navigation.

Speaking with great respect to the learned judges in the Court below, it appears to me that the error of the judgments consists in not adhering to the clear principle that the grant by the Crown of any part of the bed or soil of this estuary below low-water mark, whether for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part, that no property can be claimed in the soil except subject to this overriding right, and that there is no fact or circumstance to warrant a presumption that any correspondent benefit was given to the public in return for the imposition of this anchorage due. It is not suggested on either side that any further facts remain to be ascertained, and I see no utility therefore in directing a new trial. I shall therefore humbly

* 210 *move your Lordships that the judgment of the Court below be reversed.

LORD WENSLEYDALE. — My Lords, from the loose and unsatisfactory manner in which this case has been stated, I think that your Lordships will find a difficulty in giving a satisfactory opinion upon some of the questions proposed to be raised. Speaking for myself, I must say that I should wish a further inquiry to take place, and should therefore have advised you to direct a new trial between the parties, but having heard what my noble and learned friend, the Lord Chancellor, has said upon that subject, and being acquainted also in some degree with the opinion of my noble and learned friend opposite, I do not mean to persist in that, although my own notion is that it is consistent with the statement made upon the record, that some real legal ground might be found for

the establishment of the right of anchorage; and therefore, so far as I am concerned, I would rather that the case should undergo further investigation.

I perfectly agree, that from long enjoyment of a privilege in this case of demanding the payment of anchorage, as for a period of ninety years, from 1775 to 1864, every reasonable presumption may be made that it has continued from time immemorial; but where the privilege requires more than immemorial enjoyment, in order to be legal and valid, some other facts must exist, and there must be some proof of these facts.

Now, to make a grant of anchorage in an arm of the sea, where the *fundus maris* is the property of the Crown, but where every subject of the Crown has a right to navigate, and to cast anchor, when and where he thinks fit, as a necessary means of safe navigation, he cannot be *deprived of that right by a *211 usage however long, unless there is some evidence of a sufficient consideration, of some advantage to the subject, to enable the Crown to confer upon a particular individual the privilege of receiving compensation from the subject, and thus depriving the subject of his undoubted right.

On this record it appears to me there is not sufficient evidence of any such facts.

It is much to be regretted that the great inconvenience of the technicalities of a bill of exception, or special verdicts, being now in many cases done away with, and a statement of facts allowed on rules to show cause instead, that somewhat more pains and care should not be taken to state all that is really material. I think that this case is wanting in this respect. Here is no proof, I think, except the enjoyment of anchorage for rather less than ninety years. The case is extremely defectively stated on both sides.

Upon the case, as found, some matters are very clear. The manor of Whitstable existed before the Statute of *Quia Emptores*, 18 Edw. 1, c. 1, and there was an immemorial company of oyster dredgers there, who had established before time of legal memory, and before the Statute of Magna Charta, an oyster fishery on the sea shore of Whitstable, within the limits of that fishery, as claimed by that company, but not occupied by oysters. The defendant's vessel cast anchor. Whether the place in which the anchor was cast was actually within the limits to which the com-

pany was really entitled, and whether the anchor was cast because the vessel was in danger, or without absolute necessity, and purely voluntarily, is not stated. A claim for anchorage of 1s. had

been paid regularly since 1775 for anchoring within that
 * 212 * portion of the manor in which the defendant's vessel had cast anchor ; and that was claimed to be taken as a customary payment for the use of the soil.

In 1791 the manor of Whitstable, and the fishery of Whitstable, being a royalty of fishery or oyster dredging within the said manor, were conveyed to Edward Foad and James Smith in equal moieties, as tenants in common in fee.

By deeds of 24th and 25th October, 1792 (between whom does not appear), the manor was declared to be the property of Foad, Nutt, and Salisbury, and the rights of the lord of the manor in the fishery ; and the ground and soil thereof from the land boundaries of the fishery, and the customary payments usually made to the lords of the manor for or on account of the anchorage of any ship, or the landing of any goods, and also wrecks of the sea, were declared to be the property of Thomas Foord, his heirs and assigns. And the release contains a clause that the southeast and southwest sides of the sea beach at Whitstable, as the same is or shall be thrown up by the sea, shall be taken to be the boundary between the lands of Foad, Nutt, and Salisbury, and their heirs, and those of Foord and his heirs ; and from thence into the sea as far as his fishery extends, whether the same be more or less than the quantity of land then belonging to the fishery.

On the 30th April, 1793, an Act of Parliament passed for incorporating the Company of Free Fishers and Dredgers, and on the 4th and 5th of June, 1793, Foord conveyed the royalty of fishery and fishing oysters, and the dues of anchorage and loading, to the Company of Free Fishers and Dredgers.

The separation of what has been termed the terrestrial
 * 213 * parts of the manor from the fishery has been very properly held to be immaterial by the Judges of both Courts.

Evidence was then given of a charter of Edward IV., exempting the inhabitants of the Cinque Ports from terrage and other like charges, and that the defendant was an inhabitant. But it is wholly unnecessary to trouble ourselves with the question whether anchorage was included in the word "terrage" or not, for as the title of the lord of the manor of Whitstable dated from a period long

before the reign of Edward IV., the charter of Edward IV. could confer no exemption.

There is no difficulty also in saying that the jury would be perfectly right in presuming that the payments which had been made ever since 1775 were made from beyond time of legal memory to the lord of the manor of Whitstable, though that question does not appear to have been regularly put to them.

Again, it might be properly presumed that the oyster fishery was granted to the lord of the manor.

Again, it is hardly necessary to discuss the question whether the vessel on the occasions that she cast anchor was in peril or not, or the casting of anchor was in a sense voluntary. If the company has a right to anchorage in any case, I should think the right exists in all cases.

But the principal difficulty I feel is, that the right to the soil of the *fundus maris* within three miles below low-water mark, and to the fishery in it, though granted before Magna Charta, is undoubtedly subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation, and to take the ground there, or to anchor there at their pleasure, free from toll, unless the toll is imposed in respect of some

* other advantage conferred upon them, or at least on the. * 214 public.

Subjects may have that advantage, where they anchor in a port, in respect of the owner of the port being obliged to maintain it, and keep it sufficiently repaired and ready for the reception of ships; and it may be that the company of dredgers may have had the anchorage assigned to them, beyond the time of memory, by the owners of the port, who may have had the right of anchorage immemorially by virtue of the right to the port. But the case supplies no materials to enable us to come to that conclusion. We are told nothing about the port, its position, or the obligation of the owners.

It would be our duty, if the case admitted of it, to find a legal origin for a right so long enjoyed. It might also be due by right as a compensation for the injury by anchoring within the limits of the oyster fishery, to the breed of oysters. The grant of an oyster fishery beyond the time of legal memory, which would require some expense and trouble to establish and keep up, would, I am strongly inclined to think, justify the imposition of such toll within

the limits where oysters ought to be placed to breed. Mr. Justice Coltman, a very able Judge, in the case of *The Mayor of Colchester v. Brooke*,¹ thought that the party might be liable by ancient custom to pay to the lord of the manor a reasonable payment as the owner of a soil where there were oyster-beds, for grounding on the soil.

But whether the place where the anchor was cast in this case was within the true boundaries of the immemorial oyster-beds does not appear to be distinctly stated in * the case ; or whether the particular place where the anchor was laid was near an oyster-bed, or whether anchoring there did then, or could at any time, prejudice the actual fishery or its extension, does not appear. It might be perfectly innocuous.

For these reasons I think that the plaintiffs are not entitled to succeed. If my noble and learned friends agreed to it, I should prefer that there should be a new trial, but I do not wish to persist in that against their opinion.

LORD CHELMSFORD. — My Lords, the principal question intended to be raised between the parties in this appeal is “ whether the respondents, the Company of Free Fishers and Dredgers of Whitstable, who are owners of a fishery for the growth and improvement of oysters within the limits of the manor of Whitstable,” are entitled to demand from the appellant a payment for anchoring his vessel within the manor ; their title to demand such payment being derived from the lord of the manor, whose predecessors have from time immemorial received a customary payment “ for and on account of the anchorage of any ship or vessel within the said manor.”

The special case upon which the judgment of the Court of Exchequer Chamber is given is very loosely and imperfectly drawn, and omits many facts which are necessary to raise with proper precision the point to be decided. For instance, it is not stated whether the claim for anchorage applies to all vessels, whether anchoring within the manor without any actual necessity, or driven to do so by stress of weather or by the exigencies of navigation. Again, it is said that the appellant’s vessel was anchored upon a part of the land “ claimed by the respondents,”

* 216 and * that their claim was for anchoring on the soil alleged

¹ 7 Q. B. 355.

to be theirs; not stating that it actually was theirs. And instead of claiming the anchorage due as a payment made from time immemorial, it is only alleged that "the plaintiffs gave evidence to prove, and the jury found that, from 1775 continually down to the present time, they and those under whom they derived title had, from time to time, claimed as of right to take, and had taken, the sum of 1s. from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil."

The learned counsel on both sides expressed their desire to have the important question, whether, under the circumstances of the case, the anchorage due could have a lawful origin, decided by the House; and for this purpose it was admitted, on the part of the appellant, that the payment for anchorage had been received by the lords of the manor of Whitstable, without interruption, from time immemorial, and that his vessel cast anchor upon the soil of the respondents within the limits of their oyster fishery; and that there was no particular necessity for its coming to an anchor there. It may be observed that if the payment can legally be claimed in respect of the soil, there is the more reason why it should be paid by those who are driven by necessity or led by their own convenience to anchor upon it, because they are the persons who really derive benefit from it.

In considering the question, it is necessary to bear in mind that it applies exclusively to the claim of a toll or due for anchoring on the high seas, and not in any port or haven. I mention this in the outset, because Mr. Lush, towards the close of his argument, contended that the toll might be regarded as being claimed in respect of "a haven or port, Whitstable being a limb of *217 Faversham, one of the Cinque Ports. The claim had never been put upon this ground in all the former discussions in the Courts below; and it is clearly insufficient to sustain it. Mr. Lush admitted that the respondents were not the owners of the port, but suggested the possibility of the lords of the manor having obtained the port by devolution from the original owner. There is no ground whatever for this presumption; and even if there had been, the anchorage due is claimed, not in respect of the ownership of a port, but as a payment "of right made to the lord of the manor." The claim too is made solely in his character of

lord, and not as the owner of a fishery, so that no question of competition between the right of passage of the public in the highway of the sea, and the right of an individual to have a several fishery there, can possibly arise.

The question is thus simply raised, whether at any period of the history of this country, the Crown could have imposed upon the subjects a toll for anchoring their vessels upon the high seas within the limits to which its right to the soil of the sea shore extends, without any other consideration moving from the Crown, beyond the permission to use soil for this purpose.

The case of the respondents is very shortly and distinctly stated by Lord Chief Justice Erle, in his judgment in this case. He says, "The soil of the sea shore, to the extent of three miles from the beach, is vested in the Crown, and I am not aware of any rule of law which prevents the Crown from granting to a subject that which is vested in itself. If the Crown did grant the soil of the shore in question, it may well be that the right of taking an anchorage toll of 1s. was granted with it."

With great respect for the learned Chief Justice, I do
 * 218 * not think it can be assumed as an unquestionable proposition of law, that, as between the Crown and its subjects, the sea shore, to the extent mentioned, is the property of the Crown in such an absolute sense as that a toll may be imposed upon a subject for the use of it in the regular course of navigation. In stating the right of the Crown in the sea shore, the text writers invariably confine it to the soil between high and low water mark. The three miles limit depends upon a rule of international law, by which every independent State is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon-shot from the shore. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent is of such a character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation.

In the case of *The Mayor of Colchester v. Brooke*,¹ Lord Denman, in delivering the judgment of the Court said, "The right of soil in arms of the sea and public navigable rivers which the Crown, *prima facie*, has, independently of any ownership in the adjoining

¹ 7 Q. B. 339, 374.

lands, must in all cases be considered as subject to the public right of passage, however acquired, and any grantee of the Crown must of course take subject to such right." Now if the public possess this paramount right of passage, it seems to be rather inconsistent with such right that they should be compelled to make any payment, however small, for the liberty to exercise it. And the respondents must be driven to contend, either that the right in its origin was * not an absolute one, but that the Crown might * 219 permit it only under certain conditions, or that the right to navigate does not include in it the power to anchor at pleasure.

We were properly told in argument, that in considering the question we ought not to confine our view to the present time, but should look to the early period of our history, when the powers of the Crown were much more ample and unfettered than they have since been. But I have searched in vain amongst the earlier authorities to find any clear and distinct proof of the Crown ever having claimed such a toll as that in question, without giving some benefit to the subject as a consideration for it. Indeed it was admitted in the argument for the respondents, that some consideration for the right to take anchorage dues was necessary to be shown; but it was said that the mere use of the soil of the Crown, by casting an anchor upon it, was a sufficient consideration. None of the authorities referred to, however, supports so wide a proposition. As far as I can discover, a payment for anchorage has always been claimed in respect of a port or harbour, the creation or erection of which is for the common benefit of navigation, and constitutes in itself a sufficient consideration.

Lord Hale, in enumerating the duties which arise from the *jus dominii*, or franchise of a port, mentions "anchorage as a prestation or toll for every anchor cast there."¹ It was said by the counsel for the respondents, that it appears from the same high authority that toll might be taken for anchorage in a haven. This is true, but apparently only where the haven is within the limits of the franchise of a port. Hale describes a haven to be "a * place of a large receipt and safe riding of ships, so situate * 220 and secured by the land circumjacent that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds."² But he afterwards uses the

¹ De Port. Mar. c. 6, Hargr. Tracts, 74.

² De Port. Mar. c. 2, Hargr. Tracts, 46.

word to denote a portion of the port itself, as in page 54, where he says, "In the consideration of a port there are these two things involved, viz. first, the consideration of the interest of the soil, both of the shore or town, which is the *caput portus*, and of the soil of the haven itself wherein the ships do ride and apply"; and that the ownership of the soil of a haven, unless it is within a port, will not entitle the owner to take anchorage dues for the use of it, is laid down¹ in these terms: "The ownership of propriety is where the king or common person, by charter or prescription, is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest of propriety may, as hath been shown, belong to a subject. But he hath not thereby the franchise of a port, neither can he so use or employ it, unless he hath had that liberty time out of mind or by the king's charter." And after stating that the owner may bring in his own goods not customable, &c., he adds, "but he may not use it as a public port, nor take toll or anchorage there." Mr. Justice Williams quotes this passage in delivering his judgment in the Common Pleas, and says that "it clearly assumes that if the owner had a royal grant he might take anchorage." I do not, however, understand this to be Lord Hale's meaning. It appears to me that the correct interpretation of his language is, that without the king's grant or charter a subject cannot have the franchise of a port, and

* 221 without having a port he cannot * take toll or anchorage, which are dues arising from and incident to it.

The counsel for the respondents, in their argument in support of the claim, insisted strongly upon the analogy presented by the right of fishing in the sea, which *prima facie* all subjects of the realm possess, and of which they might formerly have been deprived by a grant from the Crown to an individual of an exclusive right of fishing. But, in the first place, it does not appear that such a right of several fishery was ever granted in what may be called the open sea. Lord Hale states that "the king may grant fishing within a creek of the sea, or in some known precinct, that hath known bounds, though within the main sea";² and again, that "a subject may by prescription have the interest of fishing in an arm of the sea, in a creek or port of the sea, or in a certain precinct or extent lying within the sea."³ But even if such a

¹ De Port. Mar. c. 6, Hargr. Tracts, 73.

² De Jur. Mar., Hargr. Tracts, 17.

³ De Jur. Mar., Hargr. Tracts, 18.

grant could have been lawfully made so as to extend beyond these defined limits, yet the right of several fishery appears to have been always subservient to the right of navigation ; and the king could not enable the owner of a fishery to do any thing which, though within the competency of an exclusive owner, was an obstruction to the passage of ships upon the seas.

In *The Mayor of Colchester v. Brooke*, Mr. Justice Coltman suggested, that although parties who wish to go up a navigable river are not obliged to wait for a particular time of the tide, yet it may be law that, if they take the ground, they may be liable to make a reasonable payment to the owner of the soil. This opinion is not stated with any positiveness ; but yet it may be correct as applicable to a navigable river, because * the owner of the * 222 soil may have given consideration for the payment by rendering the river navigable.

The necessity of discovering a *quid pro quo* for the claim in this case has driven the respondents to contend that the establishment of the oyster fishery belonging to the respondents being for the public benefit, might be considered to be a sufficient consideration for the imposition of the toll upon anchorage. It is difficult to understand how a benefit wholly unconnected with navigation, and not extending to the public generally, can be made the legal foundation for a local payment from vessels anchoring within a particular district. There is no reason why, if good to this extent, it should not be sufficient for a similar charge for all vessels casting anchor upon the soil of the Crown in any other part of the seas round this island.

I have therefore arrived at the conclusion that the undoubted right of the public freely to navigate the highway of the sea cannot be restricted by the imposition of any payment whatever, unless some good consideration can be shown for it ; and the respondents have failed to establish any other ground of title in the lords of the manor to the anchorage due than the mere use of their soil. This I consider to be wholly insufficient to justify the demand in question, unless it can be held that the right of navigation does not include the right of anchoring, which can hardly be seriously contended.

I admit that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it presumably capable of a lawful origin ; but

not being able to discover any ground upon which this claim of an anchorage due could have had a legal commencement, the
 * 223 case of *The Mayor, &c. of Nottingham v. Lambert*¹ is an authority for showing that no length of prescription can give it validity.

I am therefore of opinion that the judgments of the Court of Exchequer Chamber and of the Court of Common Pleas ought to be reversed, and judgment to be entered for the defendant.

Ordered that the said judgments be reversed; and judgment entered for the appellant (defendant in the action).

Lords' Journals, 3d March, 1865.

RALSTON v. SMITH.

1865. February 20, 23, 24.

WALTER RALSTON, *Appellant*.

THOMAS SMITH, *Respondent*.²

Patent Specification. Disclaimer. "New Manufacture." "Extend." 5 & 6 Wm. 4, c. 83.

The object of the 5 & 6 Wm. 4, c. 83, was only to permit a disclaimer to amend the specification of a patent, by removing from it something superfluous, but not to allow the introduction of that which would convert a description, in itself unintelligible or impracticable, into a practicable description of a useful invention.

The words "not being such a disclaimer as shall extend the exclusive right," do not mean in the ordinary sense of the word "extend," merely adding to or enlarging the original specification, but are also intended to describe, so confining and restricting its expressions as substantially to amount to a statement of something new.

It is not every useful discovery that can be made the subject of a patent, but the words "new manufacture," in the Statute 21 J. 1, c. 3, will comprehend not only a production, but the means of producing it.

R. took out a patent for "improvements in embossing and finishing woven fabrics, and in the machinery and apparatus employed therein." In his specification he said, "I employ a roller of metal, wood, or other suitable material, and groove, flute, engrave, mill, or otherwise indent upon it any desired de-

¹ Willes, 111.

² *Simpson v. Holliday*, Law Rep. 1 H. L. 317.

sign"; he caused this * roller to revolve with a bowl at unequal velocities, * 224 moving the fabric transversely when fed into the machine, and by these means he proposed to calender or finish, and to emboss the fabric by one process instead of two, as then practised. He afterwards entered a "disclaimer," in which he disclaimed the words in the title, "and in the machinery or apparatus employed therein," disclaimed the word "wood" from the description of the roller, and restricted the grooves or flutes on the roller to those of a circular kind. Any other grooves would not only not produce the desired effect on the fabric, but would destroy it:—

Held, that the original specification read with the disclaimer did not describe anything which could properly be the subject of a patent such as he had taken out.

Held, also, that the disclaimer here extended the exclusive right, and so had done what the statute did not intend to allow, and consequently was bad, and the patent could not be supported.

One object of the invention was to enable the operations of calendering and embossing to be done at one and the same time. *Quære*. Whether looking at the facts of the case, the patent (supposing the specification and disclaimer had been correct) might not have been maintained if it had been taken out for a new mode of using the machinery and apparatus employed in embossing and finishing woven fabrics.¹

THIS was an action brought in the Court of Common Pleas for the infringement of a patent granted to the plaintiff, on the 23d November, 1858, for "improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein."

The specification contained the following description: "I employ a roller of metal, wood, or other suitable material, and groove, flute, engrave, mill, or otherwise indent upon it any desired design, and cause it to revolve with a bowl or bowls of paper or other substance, and by means of gearing, well known to mechanics, I give the circumference of the pattern roller a quicker

* motion than the circumference of one of the bowls, so as * 225 to obtain a frictional action upon the surface of the fabric, as well as pressure, so that if the fabric is moved transversely when fed to the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage; but if two operations be given, moire antique or other varieties may be obtained, which can be still further varied, as directed, according to the number of times the fabric is allowed to pass through the machine.

¹ See the observations of Lord Chief Justice Abbott, *The King v. Wheeler*, 2 B. & Ald. 350.

"In addition to the variety of the pattern, a bright finish or lustre is given to the fabric by means of the friction or rubbing action of the two surfaces of the roller and the bowl.

"I also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar frictional or rubbing action, the gearing being simply required to be adapted for the purpose.

"It is well known that for calendering purposes plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls, but hitherto it has not been considered practicable to give pattern rollers the same relative movement.

"I claim as my invention, and which, to the best of my knowledge and belief has not hitherto been used within the realm, the employment of grooved, fluted, engraved, milled, or otherwise indented rollers of metal, wood, or other suitable material, driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or friction upon the fabric submitted to their action, and thereby produce an indefinite variety of pattern, as well as a bright finish or lustre, and also reversing

* 226 * the operation by giving the bowls a quicker motion than the pattern roller."

On the 28th January, 1860, Mr. Ralston filed a "disclaimer," in which he said, "I disclaim the latter portion of the words of the title, 'and in the machinery or apparatus employed therein,' so that the title shall henceforth be in these words: 'Improvements in embossing and finishing woven fabrics.' And I disclaim the use of any pattern rollers in performing my invention except those which are made of metal or other suitable material, and have circular grooves, flutes, or indentations made around their surfaces. I disclaim the use of any other description of design upon the surface of such rollers, except such circular grooves, flutings, or indentations as aforesaid. Also I disclaim the production of watering patterns upon a fabric at one operation or passage of it between a pattern roller and a bowl, against which it works, except when the grooves, flutes or indentations around the surface of such rollers are as numerous as the warp threads in the fabric to be operated upon, or nearly so. And I disclaim all parts of the description of my said invention contained in my said specification which are not contained in the said description as hereby altered,

and I hereby alter such description, and that the same shall henceforth describe the undisclaimed parts of the said invention in these words," &c.

"I employ a roller of hard metal or other suitable material, and make grooves, flutes, or indentations around it, and cause it to revolve with a bowl or bowls of paper, or other suitable substance, and by means of gearing well known to mechanics, I give the circumference of the pattern roller a quicker motion than the circumference of one of the bowls, so as to obtain a frictional action upon the surface of the fabric, as well as pressure. If the *grooves, flutes, or indentations around the roller are as * 227 numerous as the warp threads in the fabric to be operated upon, or nearly so, or if the fabric has already passed through between the roller and the bowl, and the fabric has slight transverse motions given to it when fed into the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage. If further operations be given, varying the extent of the transverse motions, moire antique, or other varieties may be obtained, which can be further varied as desired, according to the number of times the fabric is allowed to pass through the machine. In addition to the variety of patterns, a bright finish or lustre is given to the fabric by means of the friction or rubbing action of the surface of the roller. I may also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar frictional or rubbing action by rubbing the surface of the fabric against the roller, the gearing being simply required to be adapted for the purpose. It is well known that for calendering purposes plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls, but hitherto it has not been considered practicable to give pattern rollers the same relative movement so as to obtain any beneficial result.

"Having thus fully described, &c., I claim as my invention the employment of grooved, fluted, or indented rollers of hard metal, or other suitable material, driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or friction upon the fabric submitted to their action, and thereby produce an indefinite variety of pattern, as well as a bright finish or * lustre, and also reversing the operation by giving the * 228 bowl a quicker motion than the pattern roller."

The defendant pleaded six pleas. 1. Not guilty. 2. That the plaintiff was not the true and first inventor of the invention mentioned in the declaration, and not disclaimed. 3. That the supposed invention mentioned, and not disclaimed, was not a new invention. 4. That the plaintiff did not, within the time, &c. give a proper description of the invention. 5. That the disclaimer extended the exclusive right, &c. 6. That the privilege in the declaration mentioned, and not disclaimed, was not for the sole working and making of any manner of manufacture. The plaintiff took issue on all these pleas. The case was tried before Lord Chief Justice Erle in June, 1860.

The plaintiff was examined, and said, "I am an engraver and calico printer. Before my patent, there was a known process called 'calendering,' effected by a pair of rollers, or a roller and a bowl, the cloth passing between the two; the roller and bowl moved at different surface speeds for glazing purposes only; that is, when there was a gloss to be produced on the surface of the cloth, there was a different surface speed; the surface of the roller produced a sort of frictional effect upon the surface of the cloth. There were other processes for finishing cloth for embossing, such as produced watery appearances. For embossing, a roller and a bowl were used, and the roller was engraved. The bowls were made of paper, made very hard by pressure; the roller turned the bowl without any gearing; the surface speed of both was the same. For calendering, to produce a glossy surface, there was gearing; the relative motions of the roller and the bowl could be varied by alterations in the gearing, by altering the relative sizes of the wheels, and the numbers * of their teeth.

I had been employed as an engraver, in engraving rollers for calico printers and embossers, and it happened to me once that after sending a person an engraved roller, complaint was made about the effect of it in embossing, that I had set it too sharp, and that it cut the cloth. I altered it, and made the flutings or projecting surface shallower. After I had made this alteration, and sent it back, the purchaser of the roller came to me again, and also sent it back, stating that it had lost its lustre. The projecting lines were too flat upon the surface. In embossing in this way, the cloths are generally calendered before they are embossed. To have a high gloss this must be done. I altered the roller, and put some cloth in it. In going through the regular calendering pro-

cess, I made a slip and very nearly cut my hand. When I took the bit out, it had a particular effect. I made no other experiments then." He described as the result of subsequent experiments, that he found he could produce watering patterns as well as the effect of embossing by one and the same operation. He added — "In performing my invention, if a slight lateral motion is given to the cloth as it goes into the machine, that produces the watery effect; a larger extent of motion produces the moire antique; the chief difference is the size of the pattern; there is an endless variety. In working with the roller and the bowl, according to my invention, I give the roller a greater surface speed; that enables me to produce the glossiness upon the surface of the cloth, and at the same time to produce the pattern. Some time after I had produced my specification, I found that there were some descriptions of patterns upon rollers that could not be used in this way, and I put in a disclaimer. There were some descriptions of * wooden rollers that would not do, and * 230 therefore I confined my claim to metal only. In performing my invention with my roller, I have in the pattern roller made circular indentations; round longitudinal indentations will not do."

On cross-examination, the plaintiff said, "My first model had circular grooves, complete circles round the cylinder, in endless lines; each circle complete in itself. Separate rings, not a spiral. I made no roller but with circular lines, or what I term endless lines, separate circles, each circle complete in itself. Separate rings not a spiral. For the purposes of my patent, I did not use any thing but circular grooves or ringed grooves for embossing; for the purpose of my patent I had not used any but circular grooves up to the time of my specification; they were circular grooves or separate rings, with differences in the width of the grooves. I made them by milling or by engraving. There is no new machinery used in giving this difference of surface velocity to what was known before. Circular grooves were used for embossing; there is nothing new in circular grooves themselves. I do not know that I had observed that they were used in varying ratios to the number of warps in the material. The first that I used was much the same sort of thing as had been used before, in proportion to the number of grooves. The giving a slight lateral motion to produce a slight lateral effect was a thing that had been

done, and was well known before in creeling cloths ; that gave what is called the watered surface. The moire antique was never done before upon cotton, but upon silks."

"Some descriptions of rollers mentioned in my specification would not succeed in the material. The patent included * 231 wood. I disclaimed it, and confined it to metal. * I do not know that anybody informed me that I should limit my invention to rollers with circular grooves, and that other patterns would not do : I discovered that myself. No material besides metal will beneficially answer the purpose of the roller for what I call my invention. Other things besides paper will do for the bowls. Wood will ; leather would ; so would glass, but not every material."

In re-examination, he said he had never before known calendering and embossing produced by a single operation. "I had known transverse motions given in passing two pieces together through the rollers in this way. I say that I have known it done in this way when the metal roller went at the same velocity as the bowl, but I have never known it applied when the velocity was different."

At the close of the case, the counsel for the defendant objected that the alleged invention was a mere application of old processes, and not the subject of a patent. 2. That the specification did not describe any invention, and the process described was impracticable. 3. That at the date of the specification, the plaintiff had not invented what he now claimed as his invention. 4. That that disclaimer was void, because it departed from the specification, and also because it stated that the rollers might "be made of metal or other suitable material," without giving any criterion of suitability. 5. That the claim as it now stood was as extensive as in the original specification, and was too large, and therefore bad. 6. That the specification, as altered, did not state whether the production of watering patterns was claimed. 7. That the disclaimer confined the claim to the use of rollers with rings, and as the defendant has used spirals only, he had not infringed the * 232 plaintiff's patent. A * verdict was given for the plaintiff, subject to leave to move.

A rule was accordingly obtained, and the cause was heard in the Court of Common Pleas, and judgment was entered for the

defendant.¹ In the Exchequer Chamber, this judgment was altered, so far as to enter a verdict for the plaintiff, on the plea of not guilty.² In all other respects it was affirmed.

The case was then brought up to this House.

Mr. Hindmarch (*Mr. Bovill* was with him), for the appellant. — Taking the disclaimer and the specification together, there is amply sufficient to justify the grant of a patent. The invention was a great saving in time, and was productive of a very beneficial effect on the fabric. The effect indeed was so wonderful, that some of the cotton manufactures exported to Brazil, were there refused admission as cotton, and the duty demanded was that levied upon silk fabrics. It was useful and new. In some respects the specification was defective. It appeared to claim more than the plaintiff intended, and therefore he corrected it by a disclaimer. Thus in the first instance it was described as a patent for “improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein.” Now in truth he did not claim any thing in the machinery, but only in the use of the machinery, and therefore he disclaimed the latter part of the title. Then he disclaimed wooden rollers, for though some woods might be hard enough to be so used, others were too soft, and so he excluded wood altogether. Then he disclaimed the use * of all designs, except those of circular grooves, * 233 flutings, and indentations, and then he more specifically described the process of producing watering patterns upon his fabrics. In this way he cleared away what had been inexactly expressed in his specification, and confined his claim to what was his real invention. So far from extending, the disclaimer limited, restricted, and exactly defined the claim of the patentee.

The plaintiff discovered that by a previously unknown mode of using known machinery, two effects might be produced by one operation or process instead of two. That was a valuable discovery, and within the principle of *Booth v. Kennard*,³ was properly the subject of a patent. In *Steiner v. Heald*,⁴ by the application of hot water to fresh madder, a dye had been produced, but it left a large residuum of the material, which was called “spent madder,” and which could not be turned to any useful purpose. By com-

¹ 9 C. B. N. S. 117.

³ 1 H. & N. 527.

² 11 C. B. N. S. 471.

⁴ 2 Car. & K. 1022, 6 Exch. 607.

binning acid with the hot water, a better sort of dye was produced from fresh madder, and that left no residuum; the patentee applied this new process to the spent madder of the old process, and obtained the best sort of dye from it. In that case it was held that it could not be treated as a mere matter of law, but was a matter of fact for a jury, whether the patentee's invention was a new manufacture. That rule ought to be applied here. And in *Seed v. Higgins*¹ in this House it was determined that where the question of novelty depends not merely on the construction of the specification, but on other circumstances, such as the similitude or difference between two machines, it must be submitted

* 284 to a jury as a mixed question of law and fact. * *Hills v. The London Gas Company*² does not apply here, for there the facts had all been left to the jury, and the judgment of the Court was founded on the finding of the facts. And in *Betts v. Menzies*,³ this House would not determine on the construction of the patent as a mere matter of law, although there the essence of the invention consisted in the particular description of metal intended to be used.

The disclaimer here is warranted by the 6 & 7 Wm. 4, c. 83.

Mr. Grove (*Mr. Aston* was with him), for the respondent. — It may be admitted that if a patentee claims for the use of three processes, one of them being undoubtedly new, and his own invention, he may disclaim the other two, and the patent will be good, but where his claim is only for the use of a known machine to a known fabric, and he describes a general mode of use, and there is but one particular mode of use which is good, his disclaimer of all others is in fact the claim of a new invention.

The plaintiff himself says, in his examination in chief, "Some time after I had filed my specification, I found that there were some descriptions of patterns upon rollers which could not be used in this way, and I put in a disclaimer." Here is a distinct acknowledgment that he had claimed for and described something impracticable. It was the same with the wooden rollers, which were stated in his specification, but were now disclaimed. He saw an effect produced, but did not understand how, and he misled other people as to the means. That was the case also with respect to the engravings on the rollers. He has now

¹ 8 H. L. Cas. 550.

² 5 H. & N. 312.

³ 10 H. L. Cas. 117.

found out that longitudinal indentations *will not do. * 235 Again, in the disclaimer there is a statement that the production of watering patterns between a roller and a bowl cannot be obtained except when the grooves, flutes, or indentations around the surface of the roller are as numerous as the warp threads in the fabric. This had not been hinted at in the specification, and it was therefore in substance a new statement of a new discovery. It is impossible to deny that all these matters show the disclaimer to be the specification, and the patent originally taken out to have been valueless, because it introduced no novelty in manufacturing, and the specification was utterly unintelligible, or entirely wrong. The disclaimer is, by law, something intended to explain and qualify a specification ill expressed but not bad; but it is bad if it does not show a new and useful invention. It did not fulfil that requirement in this instance. What has been done here, is no compliance with the law, and the patent is bad. In *Hills v. The London Gas Company*,¹ the statement of Crolls that he applied oxides for the purification of gas, did not prevent Hills from obtaining a patent, for Hills specified what was the oxide required for that purpose, it being perfectly manifest that many of the oxides were incapable of effecting it. The description of spirals in this instance is as vague as that of oxides in that case; and spirals themselves will not effect the purpose, unless they are so close as to be virtually circular. There must be a good invention and specification for the disclaimer to operate upon. The disclaimer cannot otherwise be good. The alteration must be in the nature of excision, cutting out what is needless, not giving new directions, and new imports to words already used. In this disclaimer, the statement that the circular grooves must be as numerous as the threads is altogether *new. * 236 It is not the correction of an old description. The specification did not give proper information; it did not inform, but misled. The disclaimer does not correct its errors. It creates something new: and even the amended specification is defective.

In *Turner v. Winter*,² the claim was for the use of a "fossil salt" or a "marine salt," but there was no clear statement as to what salt was meant, and there, on account of this ambiguity, the patent was held to be bad. So in *Stevens v. Keating*,³ in a patent

¹ 5 H. & N. 312.

² 2 Webst. Pat. Cas. 172, 2 Phill. 333.

³ 1 T. R. 602, 1 Webst. Pat. Cas. 77.

for the composition of a cement, the ingredients and qualities not being plainly and properly stated, the claim of a patent was disallowed.

Now as to the 5th plea. The invention here claimed is not the subject matter of a patent. The mode of producing embossed patterns was known; the use of circular grooves for such a purpose was known; the employment of a difference of velocity was known, and in the specification there was no intelligible description of what was the amount of the required inequality in the velocity. [THE LORD CHANCELLOR. — Was it not new that changing the velocity of the same roller and bowl would do two things at one instead of two operations?] That is not a new manufacture. So that, though, as in *Crane v. Price*,¹ producing from things and modes already known, more economical and better results to the public, has been held to be good for a patent, yet that was because a new or improved manufacture, namely, iron of a superior kind, was produced. But even the rule which that case seems to

* 237 lay down was restricted in its operation * in the *Patent Bottle Envelope Company v. Seymer*,² where it was held that the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject matter of a patent.

And again, in *Horton v. Mabon*,³ the application of a known article, double angle iron, to the joints of telescope gas holders, instead of two pieces of single angle iron riveted together, was held not to be a good ground for a patent, for that was a mere new form of applying known things, and no new manufacture was produced. So in *Brook v. Aston*,⁴ the application of old machinery to wool and hair, to which it had not before been applied, in order to produce the same results with them as had already been produced on cotton and linen, was held not to be the subject of a patent. That is a question for the Court, not for the jury.

In *Betts v. Menzies*,⁵ this House declared that it will look at the whole case and determine whether there had been presented to the public a new manufacture such as within the rules of the law can constitute a valid ground for the claim of a patent. So looking at it, there can be no doubt that, in this case, no new manufacture has been produced.

¹ 5 Scott, N. R. 338, 1 Webst. Pat. Cas. 409.

² 12 C. B. N. S. 437.

³ 8 Ellis & B. 478.

⁴ 5 C. B. N. S. 164.

⁵ 10 H. L. Cas. 117.

Mr. Hindmarch, in reply. — The claim of the plaintiff is not for any part of the machinery, but for a new application of it, by which a valuable result is produced. That is sufficient to sustain a patent; and the finding here affirms the novelty and utility of the plaintiff's claim. If the verdict was unsatisfactory there ought to have been a new trial, but as * the record now * 238 stands there is a clear finding of novelty, and there is nothing to warrant an entry of judgment for the defendant.

February 24.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, the questions which are raised by this appeal are subjects of some nicety, and it is therefore right that the grounds of your Lordships' judgment should be very distinctly stated.

I will call your attention first to the issues raised on the record in the action below. The first plea of Not Guilty raised the question of infringement of the plaintiff's patent. The second plea alleged that the plaintiff was not the true and first inventor of the supposed invention. The third issue was, that the invention in the declaration mentioned and not disclaimed (that would be the invention as it stands in the amended specification) was not at the time of the making of the letters patent a new invention. Then those issues have all been found in favour of the plaintiff, and the findings are not sought to be disturbed by the defendant.

The fourth issue amounts, when stated in a few words, to an allegation that the invention of the plaintiff has not been sufficiently and adequately described in the amended specification, that is in the specification made after the application of the disclaimer to the original specification.

The fifth issue raises the question whether the disclaimer was warranted by the statute. That undoubtedly is, if not the most material, certainly one of the most material questions before the House.

The sixth issue was, that the invention or the privilege or patent secured by the letters patent, was not "any * manner of manufacture" within the meaning of those * 239 words contained in the Statute of James, as they have been subsequently construed by decisions.

Your Lordships therefore have to try three questions: the sufficiency of the description contained in the amended specification;

the legality of the disclaimer ; and the fact whether the alleged invention is a new manufacture within the statute.

Now undoubtedly the last issue is one which if found in favour of the defendant would almost supersede the necessity of considering the others, but as there are independent issues upon these pleas, it will be requisite to consider all the three.

Before I come to those three questions it is necessary, in order to render intelligible what I shall have to submit to your Lordships, that I should describe in as few words as I can the state of knowledge upon this subject antecedently to the plaintiff's patent ; and what the plaintiff's patent appears to be as it is found in the amended or corrected specification. Antecedently to the plaintiff's patent, machines constructed of a roller revolving on a bowl were perfectly well known, as applied to the purpose of calendering, that is, to the purpose of giving a brilliant gloss or finish to the surface of any linen or cotton fabric, or fabrics composed partly of silk and partly of cotton. It was also found that the brilliant finish or gloss was greatly increased if gearing was applied to the machines so constructed, and the gearing was arranged in such a manner as to produce a differential velocity in the revolution of the roller and the revolution of the bowl. That if one bowl was made to revolve on the same roller at a greater amount of velocity, the effect was that a more perfect finish or more brilliant gloss was given to the face of the fabric. There was also known

* 240 * and used antecedently to the plaintiff's patent, another machine which was similarly constructed, of an engraved roller and a bowl, and which was used for the purpose of impressing figures, patterns, or devices upon the surface of fabrics of the descriptions I have mentioned.

It also appears that attempts had been made to unite the two, that is, to use the machine for the purpose of impressing or engraving the pattern on the fabric with a differential velocity, so as at once to effect the operation of giving a brilliant gloss, and also to impress upon the fabric the proposed pattern or engraved surface that might be desired. But it had been found antecedently to the plaintiff's invention, that if any figure or device was engraved upon the rollers for the purpose of impressing the device upon the fabric, and they were made to revolve with the differential velocity which I have mentioned, the edges of the engraving would tear the fabric, and the effect would be the destruction of

the cloth that was submitted to that process. It is, however, most important to observe, that the idea of producing a gloss by the differential velocity of the rollers upon the bowl, and also the idea of using the same apparatus for the purpose of impressing a pattern or device on the fabric, were perfectly well known at the time of the plaintiff's patent.

Now what the plaintiff appears to have done is this: He discovered or found out that although rollers with a device or engraving upon them, longitudinally, or around the circumference, would have the effect of tearing the fabric of the cloth, yet if the engraving of the roller was limited to this, namely, making around the roller an infinite series of circular grooves of small diameter, it would have the effect of producing a particular pattern upon the cloth, and at the same time it might be worked with differential velocity, so as to effect the two operations of * giving a gloss to the cloth and at the same time impress- * 241 ing upon it a pattern, namely, that pattern which would be produced by a number of small grooves or flutes, and that this might be done without injuring the fabric.

What therefore the plaintiff has done has been to take a particular pattern out of the infinite number of patterns that might be engraved upon the roller, and to use that particular pattern alone for the purpose of impressing the fabric of the cloth with that pattern, and also at the same time giving it a brilliant gloss or finish. And to that he has added what was also a well-known process, namely, that if in the operation the cloth is fed into the machine in a particular way, namely, by a transverse motion, that appearance will be produced upon the cloth which is commonly denominated "watered," and which we see in watered silk, a wavy character produced upon the surface of the cloth, which adds very much to its appearance and its value.

Before we can judge of the truth of the allegation that this is not a new manufacture, we must advert particularly to the original specification and to the plaintiff's disclaimer, because the question whether it is a new manufacture or not, within the statute, must be determined upon the amended specification, that is upon the specification reduced by the disclaimer.

It is quite clear that the original specification was utterly bad and void in law. It was expressed in such a way that the indentations, grooves, or flutings that were to be made upon the roller

might be made consistently with the language of the original specification, longitudinally, and not merely in a circular form around the roller. And it is quite clear upon the evidence that any longitudinal grooves or longitudinal patterns would not have

* 242 the effect desired, but would be destructive of the * fabric.

Therefore, upon the face of the original specification, there was, in reality, no invention that could be maintained. And upon examining the plaintiff's own evidence, which is clearly admissible upon all the questions before your Lordships, it is plain that the original specification contained no sufficient and correct description of any useful or valuable invention. The plaintiff appears to have been perfectly aware of that, and accordingly, by his disclaimer, he has altered in a most material form the original specification.

The first point to which I would direct attention is this: The original specification says that upon the roller which is directed to be employed you may "groove, flute, engrave, mill, or otherwise indent upon it any desired design." Now those words are so many verbs: "groove" is one; "flute" is another; "engrave" is another; "mill" is another; and "indent" is another; and the accusative case, the substantive which is governed by all those verbs, is "any desired design." According to the original specification, therefore, you might upon the roller, not around the roller but upon it, in any form, spirally or longitudinally, or in a circle, groove, or flute, or engrave, or mill, or otherwise indent any design that you desired. Now it is clear upon the testimony, that if you did so you would produce a machine that would occasion a destructive instead of a beneficial result.

In the amended specification the plaintiff has struck out the material word "upon," and instead of that he has put in the distinctive word "around" the roller, and he has altered the language so as to convert this general direction contained in the original specification into a specific direction to make grooves, flutes, or indentations around the roller. And instead of

* 243 the words being made * to comprehend "any desired design," these words are entirely struck out, and the only direction now consists of a direction to make circular grooves around the roller.

It is quite obvious upon that, that the limits of the authority or license given to a patentee by the statute with respect to disclaimers, are here very much transgressed. The object of the Act au-

thorising disclaimers was plainly this, that when you have in your specification a sufficient and good description of a useful invention, but that description is imperilled or hazarded by something being annexed to it which is capable of being severed, leaving the original description, in its integrity, good and sufficient, without the necessity of addition, then you might by the operation of a disclaimer lop off the vicious matter, and leave the original invention as described in the specification untainted and uninjured by that vicious excess. But it never was intended that you should convert a bad specification, in the sense of its not containing a description of any useful invention at all, into a good specification by adding words that would convert what has been properly called in the Court below, "a barren and unprofitable generality," into a specific and definite and practical description. It is quite clear that if that could be done, you would have an opportunity of introducing into a bad patent which contained no useful invention whatever, some discovery that might be developed by further experiment, and which was altogether unknown at the time of the original specification, and not at all included in the description contained in it.

But a further observation occurs upon this, that not only was it never intended by the statute that a patentee should take advantage of it for the purpose of converting a bad description into a good description in this sense, or that, when the original description was wholly bad and * contained no new inven- * 244 tion, it should be converted into a description containing a good invention ; but the statute never contemplated that a patentee should have the power under the form of a disclaimer of making material additions to the original specification, so as by the aid of the corrected form of words, and the additions so made, to introduce into the specification an accurate and perfect description of an invention, which you seek for in vain in the original specification.

But that is exactly what this patentee has done, for after converting his general and impractical description into a specific and definite direction, he goes on in the latter part of his specification to introduce this most extraordinary and most important addition. He says, " If the grooves, flutes, or indentations around the roller are as numerous as the warp threads in the fabric to be operated upon, or nearly so ; or if the fabric has already passed through

between the roller and the bowl, and the fabric has slight transverse motion given to it when fed into the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage." And then he goes on to describe the way in which the peculiar watery effect, which is called in the trade by the name of "moire antique," may be produced. It would be impossible therefore for any one to say, "I find in the original description that which is now brought out and accurately expressed in the amended specification." Unless that can be done, the limits given by the statute have, I submit to your Lordships, been clearly transgressed.

If that be so, your Lordships, I think, will have no difficulty whatever in concurring with the Court below in the conclusion, that this is an extravagant use of the power of disclaimer, and much beyond the license or authority given by the statute.

* 245 I believe it will be found * that that license or authority consists only in the power of rejecting. It may sometimes happen that when something is cut out, some few slight additions may be required to render intelligible that which remains, and to that extent there would be authority by the statute to make a slight addition, but certainly there is no authority to alter a barren generality into a specific practical description, or to convert that which upon the description is not applicable to any one definite form, into a description applicable to a specific and definite mode of proceeding.

Adverting again to what I began with calling your Lordships' attention to, the question is, whether this description contained in the amended specification, is or is not a description of anything which comes within the words "new manufacture," as contained in the Statute of James. It is necessary for that purpose to call your Lordships' attention to the fact, that not only did the disclaimer do what I have already described to your Lordships, but it went further, and became the original title of this patent: that title had been "improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein." The patentee has deliberately by the disclaimer struck out the last words, and has therefore deliberately reduced his patent to a patent "for improvements in embossing and finishing woven fabrics." And the question is, whether so regarded, taking in your hand (with the knowledge that existed at the time) this description con-

tained in the specification as corrected by the disclaimer, does it amount to a new manufacture?

I should have thought that the patentee might have maintained a patent for a new combination if he had put his invention upon this ground, that he was the first person who discovered that the circular grooved roller would * answer by one process * 246 the double purpose of calendering and imprinting the fabric; and that he was the first person who had constructed a machine that was capable, without injury to the fabric, of effecting together both those operations. If, therefore, the original title had remained, and had not been studiously disclaimed, I, myself, should have thought it very difficult to resist the conclusion that the patent was capable of being supported as a new manufacture, under this view, that it really did describe, for the first time, a new combination of machinery. Your Lordships are well aware that by the large interpretation given to the word "manufacture," it not only comprehends productions, but it also comprehends the means of producing them. Therefore, in addition to the thing produced, it will comprehend a new machine, or a new combination of machinery; it will comprehend a new process, or an improvement of an old process. But if we look at this patent, and inquire whether there is an improvement in embossing or finishing woven fabrics contained in this amended specification, I am bound to say, that having regard to existing knowledge at the time, I think there is no such improvement as amounts to a new manufacture, because this mode of producing a brilliant gloss upon the surface was perfectly well known; the operation of the differential velocity was also perfectly well known; that the same thing had been thought of for the purpose of producing a pattern was also perfectly well known. Therefore, that woven fabrics might be finished according to one or the other of those two processes was perfectly well known. I cannot therefore, having regard to the reduced specification which the patentee has now made to constitute the description of his invention, say that there is in it any new process entitling it to the denomination of a "new manufacture." This is a * matter, no doubt, of much deli- * 247 cacy, and it is a matter upon which unfortunately we are without any aid from the judgment of the Court below; for I do not find that either in the Court of Common Pleas, or in the Court of Exchequer Chamber, any one of the Judges gave any

opinion upon this point. The general verdict that was entered for the plaintiff upon the trial has been converted upon this particular issue into a verdict for the defendant. I cannot say that my mind is free from doubt upon the subject; but having regard, as I have already observed, to the operation of the disclaimer, and being of opinion that the specification as amended is a description not of a machine, not of a new combination of machinery, but of a new process, I think there is nothing entitled to the character of a new manufacture to be found in that specification.

My Lords, for the reasons I have already given, I concur entirely with the Court below in holding that the disclaimer very much exceeds the limits of the authority given by the statute; and upon that point therefore I think the appellant has entirely failed, and that it would be a very mischievous use of the power of disclaimer given by the statute if your Lordships were to allow of its being used in the manner desired by this patentee, which would in truth confound all inventions, and you would be unable to ascertain whether the thing introduced by the amendment was or was not known to the patentee at the time when he made the original specification.

There remains the fourth issue, namely, the question of the sufficiency of the description. Upon that point it was contended strongly by Mr. Grove that the description contained in the amended specification was insufficient, and he insisted very much upon this, that the direction to make indentations or grooves around the roller was given in such a manner that it would
* 248 include * spiral grooves as well as circular grooves; and that if you admit that it would include spiral grooves, it follows that there is no limit to the spirality (if I may adopt such a phrase); that therefore it would be possible to extend the groove until it became almost like a longitudinal indentation, and that in that shape undoubtedly it must, by the evidence, be admitted to be not a valuable invention.

I think the answer to that argument is the language of the plaintiff's disclaimer. The disclaimer expressly repudiates any description of groove but a circular groove. That disclaimer is by the statute made part of the specification, and therefore I read the amended specification as containing a direction to cut around the roller circular grooves only, and not as including spiral grooves. It appears, in fact, that the grooves used by the defendant are

spiral grooves, but that in truth the spirals are so minute, so numerous, and so closely approximating to circular grooves, that according to the evidence the difference is not discernible by the eye, and accordingly it has been held that they did substantially amount to an infringement of the plaintiff's patent.

Mr. Grove then insisted that the language of the claim was wider than the direction, and that the claim would include spiral grooves even if they were not included within the description. I cannot accept that mode of interpreting the specification. If there be a distinct direction given in an earlier part of the specification to cut circular grooves only, and then if there be in a subsequent part of the specification a general reference to grooved rollers, I think your Lordships must take that to mean rollers grooved in the manner already specified, and it would be unfair and unreasonable to take those words as indicating more than what has been expressly directed.

There were some objections raised to the specification, * and particularly with regard to the uncertainty of the * 249 material, the language of the amended specification being that the plaintiff took "a roller of hard metal, or other suitable material." I do not think those words "or other suitable material" contain any thing like such a generality of direction as would be fatal to the patent; "other suitable material" no doubt would mean any material equally sufficient for the purpose with hard metal. I think your Lordships would be of opinion that there was no solid weight in that objection.

I believe those were the principal objections that were stated by Mr. Grove to the sufficiency of the description.

I think those objections were without weight, and I must therefore advise your Lordships to concur with me, that the Court below was wrong in directing a verdict to be entered for the defendant upon the fourth plea on the ground of the description being uncertain and insufficient; and I think your Lordships will be of opinion that if there is no other objection to the amended specification, it is not, properly, open to be set aside upon the ground of uncertainty.

These observations comprehend, I think, the whole of the subject upon which the House has to determine. I should advise your Lordships therefore to reverse the decision of the Court below so far as relates to the fourth issue, but to affirm the judgment

of the Court below, so far as relates to the illegality, that is to say, the unauthorised character of the disclaimer ; and also to affirm the conclusion of the Court below, so far as it affirms the proposition that the alleged invention described in the amended specification is not, having regard to the disclaimer, a "new manufacture," within the meaning of those words contained in the Statute of James. The result will be, that the appellant will succeed

* 250 so far as * relates to the fourth issue, but will fail with regard to the other issues, namely, the fifth and the sixth.

LORD CRANWORTH. — My Lords, by far the most material question in this case is as to the issue which is raised in the sixth plea. Now as to that, I confess I entertain no doubt whatever of the correctness of the Lord Chancellor's opinion, namely, that the amended specification does not disclose any thing that can, under the most liberal interpretation of the words, be deemed a new manufacture. The evidence shows (indeed there was no question or controversy upon that subject) that, long before this patent, the use of circular rollers was perfectly well known for the two objects of calendering and impressing patterns. For the purpose of calendering, the roller, and the bowl, which is but another species of roller, were made always to revolve at unequal velocities, the result of which was to give the glaze or polished surface which we see in calendered cottons. The mode in which the pattern was impressed was by a roller and a bowl, the same as in the calendering, except that it was necessary in that case that the roller and the bowl should revolve at equal velocities ; because, otherwise (as was clearly explained), if there was a pattern that went at all across the roller it would tear the cloth ; and therefore it became impossible to use the roller with the bowl for that purpose, if they were revolving at unequal velocity. However, the use of the roller and the bowl for calendering, and of the roller and the bowl for impressing the patterns was perfectly well known ; and the use of the roller and the bowl going at equal velocities and at unequal velocities was also perfectly well known ; and manufacturers were right in supposing that ordinarily speaking you could not

* 251 cause * the roller and the bowl to revolve at unequal velocities so as to impress the pattern, because it would cause destruction to the fabric. But what this gentleman discovered (and I think it was a very useful discovery) was, that there was

one particular sort of pattern which might be impressed upon the roller and made to revolve, the fabric being passed between the roller and the bowl at an unequal velocity, without tearing. But I quite agree with what was said by Mr. Grove, and it could not possibly be disputed by any gentleman at the bar, that it is not every useful discovery that can be made the subject of a patent, but you must show that the discovery can be brought within a fair extension of the words "a new manufacture." Now, how is this possibly to be called a "new manufacture"? I, as a manufacturer, have my roller, which I am in the habit of rolling upon a bowl (if that is the proper expression); the fabric passing between the two at equal velocities. Then I can impress my pattern upon it. I have my roller without any pattern engraved upon it; I can impress that at an unequal velocity, and it will calender. But I do not do them both at the same time, because I suppose that in so doing I shall tear my fabric; and I rightly so suppose, until the plaintiff makes the discovery that there is one particular sort of pattern which may be produced without tearing the fabric. Now that is a very useful discovery; but it would be strange to say that that is a new manufacture, and that therefore I am to be deprived of the most useful way of employing my roller. There is nothing new in the invention, except that I now know what I did not know before, that by a particular use of it I shall obtain a result which I did not before know that I could obtain.

The Lord Chancellor has pointed out that in the original specification there was a claim for the machinery * or apparatus employed. * 252 No doubt the plaintiff thought that perhaps he could sustain such a claim, but he very properly, I think, disclaimed it; not that I think that if he had retained it, it would have made any difference, because, although improved machinery for this purpose would be a legitimate subject of a patent, the evidence would have failed him there, for there is no evidence to show that there was any new machinery. Therefore, I think it is perfectly clear that on the sixth plea, which is the most important of all the pleas, the verdict was very properly entered by the Court below for the defendant.

So again with regard to the fifth plea, I think the verdict was rightly entered for the defendant. With regard to the fifth plea, I shall not go over again the ground which the Lord Chancellor has gone over. It is quite clear that the object of a disclaimer

cannot be to create any new right not included in the original specification. It cannot be (as it is called) to extend the specification. What the plaintiff here has done is this: He has filed a specification, which I may say is in this sort of algebraical form: "My specification consists of A, B, C, D, and all the letters of the alphabet, and any combination of all the letters of the alphabet." But it turns out that nothing will really meet his case but the combination of F and Z together. Now, no doubt when he had said, "I claim a combination of all the letters of the alphabet," a combination of F and Z would be included; but it would be trifling with the knowledge of mankind to say that that sort of specification would communicate any thing. It is true that by trying and puzzling over all possible combinations you might have found out the particular combination upon which alone the plaintiff could have relied; but that is not what the words would properly mean, and not what any authority warrants you in taking as their

* 253 * proper meaning. The distinction was very clearly pointed out in the case of *Seed v. Higgins* before this House,¹ that you may disclaim something which leaves untouched a description which is in itself perfect; but that where you have an imperfect description, you cannot say because it is (according to the language of one of the cases) a mere impracticable generality, "I exclude every thing except one single case, which though involved in it, could not by any reasonable investigation have been discovered by an ordinary person."

I think, therefore, with the Lord Chancellor, that upon the fifth plea also the judgment of the Court below was perfectly right.

My Lords, I wish to make one observation with regard to a remark which fell from the Lord Chancellor. The Lord Chancellor said that he did not think that this part of the case upon the sixth plea had been adverted to in the Court below. I think, begging his pardon, that is a mistake. I observe at the end of the judgment of Lord Chief Justice Erle, he says, "We also observe that a patent for the exclusive right to one particular use of a known machine might be objected to, although the patentee may have discovered how to use the machine more beneficially than the owner knew." I think it is apparent that Chief Justice Erle was there adverting to the sixth plea.

With regard to the fourth plea, I am not at all prepared to differ

¹ 8 H. L. Cas. 550.

from the Lord Chancellor, though I confess I have had my doubts whether the Court below was not right upon that also, namely, upon the question of what had been termed (we have manufactured a word for the occasion) "spirality." At the same time I think, by fair interpretation, we may take it that the new indentations * which were described were intended to be circular, and in that case I think the specification, as amended, would be a good specification. Therefore I concur with the Lord Chancellor in thinking that upon that plea we ought to reverse the judgment below, and direct a verdict to be entered for the plaintiff.

LORD CHELMSFORD. — My Lords, I agree with my two noble and learned friends that the verdict ought to be entered for the plaintiff upon the fourth plea, and for the defendant upon the fifth and sixth pleas.

With respect to the fourth plea, which raises the question of the sufficiency of the specification as it stands after the disclaimer, I agree entirely with my noble and learned friend on the Woolsack, and concur in the reasons which he has given for his opinion in this respect, to which I have nothing to add.

The question raised by the fifth plea is, whether the disclaimer extended the exclusive right granted to the plaintiff by the letters patent. It seems clear that the word "extend," in the 5 & 6 Wm. 4, cannot be used only in its ordinary sense of "adding to" or "enlarging," because the exact meaning of the term "disclaimer" to which it is applied, is the renunciation of some previous claim actually or apparently made, or supposed to be made. It must therefore be intended to comprehend a case where the disclaimer would give the patentee a right which he could not have enjoyed under the specification as originally framed. Here the specification was conceived in general terms, embracing an indefinite variety of modes of indenting upon all descriptions of rollers any desired design. The plaintiff afterwards discovered that no other rollers but those which had circular grooves, * flutings * 255 or indentations around their surfaces would answer; and he therefore, by his disclaimer, limited his invention to this description of rollers only. Now as these were not specifically described in the original specification, but were merely involved in the general terms which were used, the plaintiff had not complied with the

condition of the letters patent, in particularly describing and ascertaining the nature of his invention. When therefore, by his disclaimer, he confines his claims to circular grooved rollers as his sole invention, though in one sense he may be said to narrow a right, yet he really extends it, because he thereby describes his alleged invention sufficiently to enable him now to assert a right under the patent which he never could have successfully maintained upon the original specification alone. Upon this short ground, and looking merely to the specification and the disclaimer, without referring to the evidence, I have come to the conclusion that the defendant is entitled to have the verdict entered for him on the fifth plea.

The sixth plea raises the question whether the plaintiff's supposed invention, or rather his discovery, is the proper subject of a patent. The claim made in the specification, as amended by the disclaimer, is for the invention of a process by which, by means of rollers and bowls, the rollers having grooves, flutes, or indentations around them, and revolving with greater velocity than the bowls, the embossing of patterns on fabrics and adding a finish or lustre to them, may be effected by one single operation. Before the patent, an engraved roller and a bowl had been used, with equal surface speed, for embossing. For the process of calendering, two rollers or a roller and a bowl had been employed, having different surface speeds and circular grooves for embossing had also been in use. There was therefore nothing new in the process
 * 256 of embossing * with pattern rollers, and nothing new in giving a differential speed to the roller and bowl for the purpose of producing a gloss or finish, nor in the employment of circular grooves. But the plaintiff conceived the idea that the same machine by means of gearing, communicating motion from the roller to the bowl, could be made to produce any kind of pattern, and give a finish to certain fabrics by one and the same operation. After he had taken out his patent he found that his general notion was erroneous, and that only one description of roller, viz. those with circular grooves, could be successfully employed, and he therefore by a disclaimer limited his claim to this single application of the machine. What invention was there in all this? The plaintiff does not claim to have invented any new combination of machinery, although by part of the title of his patent which he afterwards disclaimed, he appears originally to have considered

that he was an inventor in this sense; nor has he introduced to the world any new process; but the utmost that he can lay claim to is that he has discovered that by giving a differential motion to different parts of an old machine, a power existing in it might be developed and brought into action. It appears to me that such a discovery is not the subject of a patent, and that therefore the defendant is entitled to a verdict upon the sixth plea also.

Ordered, that the decision of the Court below on the fourth issue be reversed, and that a verdict be entered thereon for the plaintiff (appellant): and that the decision of the Court below on the fifth and sixth issues be affirmed.

Lords' Journals, 24th February, 1865.

*THE ATTORNEY-GENERAL v. THE EARL OF SEFTON. *257

1864. May 30; June 3. 1865. March 3.

THE ATTORNEY-GENERAL, *Appellant*.

THE EARL OF SEFTON, *Respondent*.

Succession Duty. Time when it attaches. 16 & 17 Vict. c. 51.

The value of property for the purposes of the succession duty, under the 16 & 17 Vict. c. 51, is to be ascertained at the time when the interest of the successor accrues. If the property has then no saleable value, nor any actual or potential annual value, it is not capable of being assessed. Neither possible increase nor diminution in the value of the property after the succession accrued was dealt with by the Legislature.

No system of assessment or charge can be adopted which draws into the calculation of value a prospective or future benefit.

When therefore A. succeeded to land which, as alleged by the successor, and admitted in the information, had not for some years before the predecessor's death produced any annual income, and did not produce any, annual or otherwise, to the successor, but of which he afterwards sold part, he was held not liable to duty under the provisions of the statute in respect of the part sold.

Per THE LORD CHANCELLOR (LORD WESTBURY). — *Semle*. That property (not specially exempted under the statute), which at the time of the accrues of the succession produces no annual income, but which is capable of being sold in the market, and would fetch a price there, can be assessed as upon an annual

value, equal to interest at three per cent. on the price that might then be obtained for it.

Per LORD WENSLEYDALE. — "The beneficial enjoyment" mentioned in section 21 means no more than the enjoyment of the possessor in his own right, and for his own benefit, not as trustee for another.

Per LORD CHELMSFORD. — The 39th section applies only "when the value of a succession shall not be ascertainable under any of the preceding sections."

Per LORD CHELMSFORD. — The word "first," in the 45th section, applies only to such cases as those mentioned in the 23d, 24th, and 25th sections, with respect to timber, advowsons, and leases.

UPON the death of the third Earl of Sefton, on the 2d August, 1855, his son, the present Earl, became entitled in possession to certain land called the Toxteth Park Estate, near Liverpool. The land in question then was and had been for ten years previously, unoccupied and unproductive, nor was it then in demand or marketable as building land. It did not form part of the return made to the Inland Revenue Office for the purpose of settling the amount of succession duty payable by the present Earl. Some correspondence took place between Mr. Trevor, the solicitor for the inland Revenue, and the respondent, on the subject of this property, and the Earl, on the 2d April, 1857, sent to Mr. Trevor the following paper: — "I hereby give you notice that the several plots of land specified in the schedule E. hereto annexed, forming part of the Toxteth Park Estate, devised to me by the will of the late Charles William Earl of Sefton, are not comprised in the return this day made by me, pursuant to the Succession Duty Act, 1853, inasmuch as the same plots of land, being wholly unoccupied and unproductive, and not capable of yielding income, fluctuating or otherwise, I am advised that no succession duty is, or will be payable thereon." The Schedule E. comprised plots of land, containing altogether 48,272 square yards.

Mr. Trevor wrote an answer on the 6th April, 1857, acknowledging the receipt of the notice, and adding, "This land not at present yielding any income, has not been noticed in the assessment made on the 3d instant, of the amount of succession duty payable by your Lordship. But if, after any interval from the late Earl's death, you should derive income or profit from this land, I beg to observe that your Lordship will be expected to deliver a further account, in order that succession duty may then be calculated according to such value thereof."

No reply was sent to this letter.

On the 22d April, 1862, Messrs. Eden, of Liverpool, the * solicitors for the Earl, wrote to Mr. Trevor a letter in * 259 which, after reciting fully the two previous letters, they said, "Under these circumstances, Lord Sefton considers it right to inform you that he has recently sold a portion of the land specified in the Schedule E. to his notice, containing about 1561 square yards, at the rate of about 16s. the square yard. Lord Sefton having been advised by counsel that no succession duty attached upon any of the land comprised in that schedule, cannot now be advised to render any formal account of the land recently sold, or to pay any succession duty in respect thereof. We may add, however, that should the commissioners still think that succession duty is payable, Lord Sefton will be glad to concur in a special case for the opinion of the Court, or in any other course by which the point can be expeditiously and satisfactorily decided."

About one thousand square yards were subsequently sold at 6s. per square yard.

In January, 1863, the Attorney-General (Sir W. Atherton) filed his information in the Court of Exchequer against the Earl, setting forth the above facts. The information contained the following statement: "It is alleged by the defendant, and not disputed by the Attorney-General, that at the time of the death of the defendant's father, and of his becoming entitled as aforesaid to the land in respect whereof he so declined to pay succession duty, the same was not in demand or marketable as building land, nor was it capable of being sold or let profitably as such * * * and that the said land was not, at the time of the defendant's becoming entitled thereto, capable of being used productively for agricultural or other purposes, and that such land was then, and had been for ten years previously, and (except that portion thereof which has been sold, as before stated) has ever since been wholly unoccupied and unproductive, and * that * 260 during no part of that time has any income or annual profit been derived from it." And that from the part which had been sold, the defendant had derived no profit up to the time of the sale.

The information prayed (among other things), "that it may be declared that the defendant is chargeable with duty after the rate of one per cent. in respect of his succession to the land mentioned in Schedule E. to his aforesaid notice, or at least so much of the

said land as has already been, or may at any time hereafter be, sold or otherwise disposed of."

The defendant put in an answer, admitting the statements in the information to be true, but denying his liability to pay succession duty in respect of the said land.

The case was argued in the Exchequer before the Lord Chief Baron Pollock, Mr. Baron Martin, Mr. Baron Channell, and Mr. Baron Wilde; and on the 6th July, 1863, the Court (Mr. Baron Martin *dies.*) made a decree declaring that the defendant was not chargeable with succession duty.¹

This was an appeal against that decree.

The Attorney-General (Sir R. Palmer), The Solicitor-General (Sir R. P. Collier, — Mr. J. Locke, and Mr. Hanson were with them), for the Crown. — It is not stated here that the land was of no value, but only argumentatively that it was not in demand; nor is it stated that the land could not be let at any rent. If it was of some value, or if it would fetch some rent, the duty attached upon it and could be ascertained. The statement merely amounts to this, that at the time of the succession accruing, it could not be made largely profitable, but that the largely profitable use of the land would arise when it could be leased or sold for building purposes to meet the increasing wants of Liverpool. Under these circumstances the burden of proof that he is exempt from liability to the duty, lies on the respondent, for otherwise the duty is fixed on the land by statute. And for that purpose, the worth of it must be ascertained, according to its real value, not according to the profitless abandonment of it, an abandonment of only a temporary nature, in order by delay much to increase its profitable employment. [THE LORD CHANCELLOR. — Suppose the respondent had not excepted it from the return, what would the Crown have done?] The property would have been duly assessed. The duty, by the 20th section, attaches on the death of the holder, when the successor becomes "entitled in possession to his succession," though the payment of that duty, which ought properly to be made at that time, may be under certain circumstances postponed. That section provides that if any charge then exists, the duty in respect of the increased value accruing upon the determination of such charge, if not pre-

¹ 2 H. & C. 362.

viously paid or compounded for, "shall be paid at the time of such determination." The principle which is to govern a case like the present is there clearly laid down.

Then how is the value to be ascertained? That is provided for in the 21st section. The object of that section was to make an annuity the measure of the value, and the amount of that annuity was to be taken as the measure of the interest of the successor. The first branch of the section provides for ascertaining the annuity; the second, the mode of payment by instalments; and the third mitigates the operation of the second in favour of a successor, whose interest determines with his death. The duty is not a tax on income, but on property. *In Re Elwes*.¹ [THE LORD * CHANCELLOR. — If the return had been made at *262 first, perhaps, this argument could not have arisen. The 45th section seems to provide that such return shall be made, and the assessment made on the state of things as then existing.] Perhaps so. But if the value had not then been exactly ascertainable, it might under the 39th section have been the subject of a composition made with the assent of the commissioners. [LORD WENSLEYDALE. — Suppose at the time of the death the land was mere barren rock, incapable of producing any thing, and no return of it was made; but at the end of twenty years a gold mine should be discovered there, would the duty be payable on the mine?] It would. [THE LORD CHANCELLOR. — Suppose the succession to be to fifty acres of land, of a settled annual value, and the duty paid on that value, but ten years afterwards a valuable coal mine was discovered under this land, would the duty be payable on the mine?] Perhaps not. But if the successor pays no duty whatever on succeeding, and withdraws the property from the return as valueless, and afterwards it proves to be of value, he must pay on that value. If it has any value, the 10th section makes it liable to duty for that value. This property always was of value, but not of such large value at the time of the succession as afterwards. Still, it cannot be said that because its value was not ascertained then it could not be ascertained afterwards. [THE LORD CHANCELLOR. — How would it be if the land was in an agricultural district, and 2l. an acre were all that could be got for it, but by the rapid extension of a neighbouring town it became much more valuable?] That is provided for by the words of the

¹ 3 H. & N. 719, 722.

20th section. If there is a *bond fide* occupation in a certain manner which may be adopted for assessing the value, the Legislature

has not desired that in such a case there shall be any specu-

* 263 lation as to future * possible increase. The successor may

make a return as to the value of the timber, but if he

should not, and afterwards the timber should be cut down, he

would be liable for what it then fetches. The same principle is

applied by the 24th section to advowsons, which are not liable to

duty unless disposed of, and fines are not to be calculated till they

are received. If necessary it may be contended that this case

falls within the 26th section. [LORD WENSLEYDALE. — Is any

thing to be taxed except the then annual value?] The taxing

clause is the 10th, and that does not use the words “annual

value”; the words are the “value of the succession”; it is only

in the 21st section that the words “annual value” are intro-

duced, and they are introduced to explain in what way the value

is to be ascertained. The fallacy of the argument for the exemp-

tion depends on the use of the word “actual,” which does not

exist in the Act, but has been introduced into the arguments.

[LORD WENSLEYDALE. — Suppose I have a mine running under

my ground, but I prefer to leave it unused, are you to charge me

for what I do not use?] Such a case has not been expressly pro-

vided for, because the owners of property are always supposed to

use it in the way most productive for their own interests. But it

would be a strange thing to say that where property of great

value exists, it should escape taxation altogether because the

owner chooses to put off the use of it to a future time, and especially

if he chooses to do so in order thereby greatly to increase its value.

Sir H. Cairns and Mr. Mellish (Mr. Crompton Hutton was with

them), for the respondent. — It is quite clear that the Act of Par-

liament, for the general purposes of taxation, requires the value

of the succession to be ascertained at the time it accrues.

* 264 There * are certain specific exceptions to this rule, which

are specially provided for. Then there are successions, in

respect of which no duty is payable. And lastly, for the purpose

of ascertaining value, the land is to be dealt with as it is, not as it

may ultimately become. And this is not altogether in favour of

the successor, for if the value is ascertained to be 10,000*l.*, though

as he employs it it may only produce one per cent., the annuity

must be calculated as directed by the statute. Of course too it is not pretended that if agricultural land is wilfully allowed to be barren, and go to weeds and rubbish, the value is to be taken upon it in such a state, so that the utter neglect of it shall free it from all duty, but the duty is to attach on it according to its value in ordinary circumstances, and not to be imposed upon it in respect of any extraordinary value which accident or the particular skill or self-sacrifice of the owner may confer upon it. For example, as the Lord Chief Baron said,¹ suppose a man in the neighbourhood of a populous town is the owner of an ancestral mansion and park, the value of his property would not be so great as if he pulled down his mansion, cut up his park, and let it all out on building leases; but the value must be calculated on it as it stands, not as he might make it if he chose so to convert it. Of course therefore, if there is another piece of ground which is not building ground, and is not capable, in the state in which it is at the moment of the succession accruing, of being employed profitably, the value must be assessed on it as it then stands. The same rule must also be applied to land which, though of small value at the time of the succession, may afterwards be found to have under its comparatively valueless surface a productive and very profitable mine.

* The 39th section has no bearing on this case; it is in *265 fact a section which imposes no duty, but it gives power to the Commissioners to relieve persons from difficulties which might be felt through some other provisions in the Act.

In like manner the 45th section applies only to the manner of proceeding, and relates to the time when a first payment shall become due in those cases in which, by other sections of the Act, payments are to be made at different intervals.

The 2d section does not create any liability; it is a mere interpretation clause. Nor does the 10th section itself impose any duty. The liability is to be looked for in that section only when taken in connection with others. And certainly the contention that an unopened mine is a "succession" liable to duty, cannot be supported. So the 20th section does not contemplate a future assessment, though it contemplates the possessor not becoming entitled in possession on the death of the predecessor, and provides for payment when he actually obtains possession. The 21st

¹ 2 H. & C. 332.

section alone gives the rule as to valuation, and if the case is not brought under that section it cannot be brought under any other. By that section the interest is to be treated as that of the value of an annuity equal to the "annual," which must mean the actual annual value of the property, and payable from the date of the successor becoming entitled thereto in possession. There is nothing in that section which declares that if the property is of no value when the succession accrues, but becomes of value afterwards, the duty shall be assessed on such future accruing value. This sort of taxation is not imposed in terms, and it cannot be imposed by implication. Adwosons and timber are specially provided for, and where no such special provision has been made, none can be implied.

* 266 * Take the provisions of the 21st section. Suppose the case of some specific personal property of great intrinsic value, but of no annual value, such as jewels, or a museum. Suppose this property so settled as to be enjoyed by the tenant for life, merely in its then condition which is productive of no annual value, but after his death is to be converted into money, and to be invested in land. The tenant for life dies. When the jewels had been sold and converted into land, but not before, the annual value to be derived from the land might be taken as the basis on which the annuity was to be calculated. If there is no annual value with one successor there can be no taxation on him, nor any till, in the time of the next successor, an annual value arises. An unfelled and unsold tree is of value, yet while unfelled and unsold does not become liable to taxation as a tree. [THE LORD CHANCELLOR. — A timber tree has a sensible but not an annual value. When sold it becomes part of the succession, and is liable to duty. The successor would then be bound to make a fresh return. Following that rule, does not the 45th section impose on the successor the duty of doing so with regard to other property which comes within the same description ?] The whole of the proposition contained in that question is not assented to. The answer to the question is, that timber is part of the succession. If annually lopped and cut it might produce an annual value. It is specially provided for by the 23d section. [THE LORD CHANCELLOR. — But is it true that the 21st section is to be applied once for all on the succession accruing and never afterwards ?] It is so in the case of land ; and in those cases not otherwise specifically provided for under the Act.

Suppose the land at the time of the succession to be entirely without value, but fifty years afterwards, during the incumbency of the same successor, it becomes productive, he could not * be assessed for it on its new value ; the Crown must wait * 267 till the next succession accrues. The statute would otherwise be a bar to the investment of capital and to improvements.

The Attorney-General, in reply. — The 10th is the taxing section of the Act. It is made applicable by other sections, which show how the value is to be ascertained. The succession duty has been treated in this argument as if it was a tax upon income ; but it is not. It was truly represented in the argument of the Attorney-General in the case of *Elwes*¹ as “ a portion of the principal sum representing the value of the entire succession arrived at, by taking such value as equal to that of an annuity of an amount equal to the annual value of such property.” This land was part of the entire succession, and ought to be taken into consideration as forming part of that on which the annuity was to be calculated.

1865. March 3.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, two questions arise on this appeal : First. What is the subject of taxation in a succession ; and secondly, at what time is that subject to be ascertained and assessed.

For this inquiry the material sections of the Succession Duty Act appear to be the 10th and 21st. The 10th is the taxing clause, and it imposes duties according to the value of the succession ; which value is to be ascertained by the machinery of the 21st section. By this latter section it is declared that the interest of every successor in real property (with certain exceptions) shall be considered to be of the value of an annuity equal to the annual value of such property (that is of the property the interest in which constitutes the succession) * after making certain al- * 268 lowances ; and the questions which arise are, what is meant by annual value, and at what time such value is to be ascertained.

Are the words “ annual value ” satisfied by taking the actual yearly value of the property in its existing state and manner of enjoyment, or the value which it would yield if applied or enjoyed in a different manner ? And is the annual value to be ascertained

¹ 9 H. & N. 719, 722.

at the time of the accruer of the succession, or will it include any future value, which it is certain or probable that the property will have within a short period of time. Upon these questions I think it clear that the value must be ascertained at the time of the accruer of the succession; and when the property is at that time yielding or capable of yielding annual income. I agree with the Lord Chief Baron and Mr. Baron Wilde, that the full present actual yearly value of the property in its existing state or mode of enjoyment is the subject of assessment.

I concur with Mr. Baron Wilde, that no system of assessment or charge can be adopted which draws into the calculation of value a prospective or future benefit, which is uncertain as to the time of its incidence. But there may be successions which at the time of accruer neither yield, nor are capable of yielding in their existing state any annual income, but yet are saleable and would fetch in the market considerable sums; and in such cases I incline to think (but the point does not now require decision), that the property which forms the succession (not being excepted from the operation of the Act, which is the case with unopened mines, timber, and advowsons) has an annual value within the meaning of the Act, namely a value equal to interest at three per cent. on the sum

that might have been realized if the property had been sold.
 * 269 at the time of the accruing of the succession; * and that the successor cannot baffle the statute by postponing a sale until a future period.

Such might have been the course adopted in the present case; for it is impossible to suppose that land which sold for a large sum of money within a few months after the accruer of the succession was not of some value to be sold at the time of the succession. But this course was not taken, and the present appeal must be decided on the facts which are clearly admitted by the Crown. For if the property has not at the time when the interest of the successor accrues any saleable value, or any actual or potential annual value, it is clear that it is not capable of being assessed, and that it is not a "succession"; which word is defined to mean property chargeable with duty under the Act.

And this is as between the parties before us the condition of the property in question. The information admits "that at the time of the death of the defendant's father, and of his becoming entitled to the land, the same was not in demand or marketable as

building land, nor was it capable of being sold or let profitably as such"; and then the word "profitably" is explained by the subsequent allegation "that the land was not at the time of the defendant's becoming entitled thereto capable of being used productively for agricultural or other purposes, and that such land was then and had been for ten years previously, and has ever since been wholly unoccupied and unproductive, and that during no part of the time has any income or annual profit been derived from it."

Upon these admissions I am of opinion that the property, the respondent's interest in which is alleged to be a succession, had no assessable value at the time of the respondent becoming entitled, and that the Crown is not * entitled to any duty. I * 270 shall therefore move your Lordships that the decree of the Court below be affirmed, and that the petition of appeal be dismissed with costs.

LORD WENSLEYDALE. — My Lords, the question in this case which is very important, arises upon an information on the revenue side of the Exchequer on the Succession Duty Act, 16 & 17 Vict. c. 51. The somewhat loose and inaccurate form in which the information is drawn at first sight occasioned some little doubt what was the precise question meant to be raised. Upon carefully considering the statements of facts in the information, I have come to the conclusion that it is meant to be stated that the land had no annual value at the time that the present respondent succeeded to it; and the question for us to decide is whether in that case the present Earl of Sefton is liable to succession duty.

The information states — [His Lordship went through it, see *ante*, p. 259.]

That would leave the question unanswered, whether it could be made productive of some annual profit with ordinary care. But the information goes on to state that the respondent sent a notice that the land in question was wholly unoccupied and unproductive, and not capable of yielding income, fluctuating or otherwise, and that therefore the respondent was not liable to pay duty. And the information admits the truth of this notice.

It seems that the result of these statements in the information is, that at the time of the succession taking place on the death of the father, the annual value of the land in question was nothing;

it was waste land. The land produced no rent, and was incapable of yielding any, even though ordinary care was taken to make it as productive as it could be reasonably made. And the

* 271 question * then for your Lordships is, whether the annual produce during the first year of the succession being nothing, any succession duty is payable. I think it is not.

The very able opinions of the Lord Chief Baron and Mr. Baron Wilde, who have discussed the question most fully, have satisfied me that the calculation of the succession duty is to be on successions according to their value (by section 10), and is to be calculated (by section 21) at the value of an annuity equal to the annual value of the property, and is to be payable from the date of the successor becoming entitled thereto in possession in eight equal half-yearly instalments, the first to be paid twelve months next after the successor has become entitled to the beneficial enjoyment of the real property. The beneficial enjoyment means no more than in his own right, and for his own benefit, not as trustee for another.

If the property is then of no annual value whatever, there is no basis whereon to make any calculations. If the land increased afterwards in value by the exertion and employment of the capital of the successor in improving his own property, it is out of the question to suppose that such increase of value should be taxed. That never came in any degree from the predecessor. If the property should increase by the advancing prosperity of the neighbourhood, or by wholly accidental circumstances, as the discovery of minerals, such increase of value does not appear to have been in the contemplation of the Legislature. Neither its increase nor diminution after the succession took place seems to have been thought of by the Legislature.

This part of the case has been most ably discussed, and very satisfactorily to my mind, by two of the Judges below, and particularly by Sir James Wilde, who has entered more fully into it.

* 272 * All that the Act says is, that the taxation in this particular case of land, simply, is to be according to the annual value, not the whole value of the corpus of the land. For land of fluctuating value, for land producing casual profit as timber, and for mines, the Act has made special provisions. For land alone, simply, the only mode of taxing is a percentage varying in amount

with the remoteness of relationship, and in the clause imposing the duty expressly, it is to be according to the annual value, beginning at the period of first enjoyment, and payable annually, the first portion at the end of the first year.

Baron Martin argues that it cannot be supposed that the Legislature could have meant to leave valuable land, much more valuable land than the best land used in agriculture, untaxed. But no proposition can be more clear than that, however likely it may be that such land should not be omitted, the subject cannot be taxed unless there are words clear enough to impose the taxation. There must be clear words. There certainly are no words of that character here.

It is clear that nothing but annual value is taxed. It was so admitted in the very able argument of the Attorney-General; whenever it is to be actually taxed, and in the 21st section, which enacts the time of calculation, no other time for its commencement is contemplated than the beginning of the succession. If then there is no annual value, there is none to calculate from, and what the Legislature requires cannot be done.

But it is contended that the moment annual value begins to arise the calculation ought to begin. Is this to be the case? Is the waste land to be taxed if it becomes valuable ten or twenty years afterwards? Is there to be a distinction between those cases in which it becomes * annually profitable, altogether by *273 the industry or capital of the successor himself, or in part from the same cause? Are the eight half-years to be dated from such an event, however remote? Is there to be no inquiry whether that increased value is caused in some degree by the successor's own capital or industry? Is there to be a fresh date for each additional improvement in several years, so as to have continual succession duties as to each part? I consider that the Legislature never contemplated such a succession of taxes, which it would be difficult to ascertain and fairly to adjust; but that what was meant has been said, the Legislature imposing the duty with respect to land, simply fixing it for the whole period of each succession, once for all, and that according to one fixed criterion, which was the annual value of the land at the time at which the succession begins. There is no provision whatever made for any future calculations, beginning from another period than the first period, than the first year of the succession, and if there is no annual value, then there is no duty.

If there should be any subsequent increase of value from any cause, the Crown will have the benefit of such increase on subsequent successions.

As to the case suggested by my noble and learned friend the Lord Chancellor, where land has no value at the time when the succession begins, but is capable of being sold, and so producing an annual value on the interest of money, I do not think it necessary to give any opinion, as it does not arise in this case.

The Lord Chancellor, in the course of the argument, suggested for consideration whether the interpretation clause, which enacts that the term "succession shall denote any property chargeable with duty under this Act," does not assist the Crown in this case.

I do not feel sure in what way this enactment in the first * 274 section can * be of use to the Crown. There is no doubt that the word "succession" does denote in the Act a succession liable to duty, and the Act provides for the mode of levying each duty; but it does not follow that everywhere, when that term is used, it has an addition to be made to it by construction, of a direction to levy it in another mode, if that provided is insufficient. No doubt the Legislature meant the tax to be levied by eight half-yearly portions of the tax, beginning at the commencement of the succession; but you cannot, by virtue of the definition, add another beginning at a different time, when that mode of levying is inapplicable. Therefore I concur entirely with the motion of my noble and learned friend the Lord Chancellor.

LORD CHELMSFORD. — My Lords, in determining the question of the liability of the defendant to the payment of succession duty, we must take the facts as they appear upon the face of the information, in which there is an admission that "the several statements contained in the notice and letters set forth are according to the fact." Now by the notice delivered to the Commissioners of Inland Revenue, accompanying the defendant's account for assessment, it is stated that the plots of land as to which the question now arises are "wholly unoccupied and unproductive, and not capable of yielding income, fluctuating or otherwise." The Board of Inland Revenue acquiescing too readily in this statement, informed the defendant that, if after any interval from the late Earl's death he should derive income or profit from the land, he would be expected to deliver a further account, in order that

the succession duty might then be calculated according to the value.

Now whatever was the state of the land at the time of * the succession, whether profitable or profitless, this mode * 275 of viewing the claim of the Crown was equally erroneous.

Upon reference to the statute, it will appear that the time when the question arises whether duty is to be paid, and if payable, upon what value, must be determined once for all, when the succession falls, and cannot be left for future ascertainment. If at the time when the successor becomes entitled to the property it is utterly valueless and incapable of realizing any annual profit, the liability to duty is not to be left open to the possible contingency of its thereafter becoming valuable, but must depend altogether upon its actual present condition. If it possesses any value upon which the duty may be calculated, there can no more be any future estimate upon its improvement in value than there would be a return of duty upon the deterioration of the property after the proper duty, payable when the succession fell, had been ascertained and paid.

This appears to me to be clear from a consideration of some of the sections of the Act. The 10th section enacts, "that there shall be levied and paid in respect of every such succession aforesaid, according to the value thereof." These words necessarily refer to the preceding part of the Act where the meaning of the word "succession" is explained. The interpretation clause (section 1) states that in the construction and for the purposes of the Act, the term "succession" shall denote any property chargeable with duty under this Act. These words seem to be intended to embrace every description of property which in its own nature would be chargeable with duty, although from some accidental circumstance connected with it at the time when the succession falls, it might happen not to be capable of or liable to assessment. If they were construed to apply not merely to property of * a kind * 276 to be *prima facie* liable, but to such as from some present circumstance temporarily affecting it happens not to be in a condition to be the subject of an estimate for duty, there would be a conflict between the meaning of the interpretation clause and of the 2d section. This latter section enacts that "any beneficial interest in property or in the income thereof" (by which I understand a beneficial enjoyment in contradistinction to holding as trustee), "shall be deemed to confer a succession."

This succession arises upon the death of some person dying in possession or expectancy. Therefore the 10th section making every succession, previously mentioned and explained, liable to duty according to the value thereof, such value must necessarily be estimated at the time of the devolution of the property to the successor, even if there had been no other provisions than these in the Act.

But the 20th section places the matter beyond doubt, for it enacts that the duty imposed by the Act shall be paid "at the time when the successor, or any person in his right or on his behalf" (words pointing to the case of a trust estate, and further explaining the words "beneficial interest" in the 2d section) "shall become entitled to the succession."

The 20th section having provided for the period when the duty is to be paid (obviously meaning by the words "is to be paid," becomes due), the 21st section enacts in what manner it shall be assessed, and at what times it shall be payable. Now the interest of the successor is to be considered as of the value of an annuity equal to the annual value of the property. There is no other mode provided for calculating the duty. If, therefore, when the successor becomes entitled in possession to his succession (being

* 277 * the point of time at which alone the duty imposed is to be ascertained in the manner prescribed by the Act) the property has no value, how can it possibly be made the subject of an assessment for duty, either then or at any subsequent period?

I do not think that any of the sections referred to in the argument countenance the idea that the ascertainment of the duty to be paid can be postponed to any period after the death of the predecessor. The 37th section providing for cases where a successor shall not have obtained the whole of his succession at the time of the duty becoming payable (that is when he becomes entitled in possession to his succession), clearly does not mean where he shall not have realized the whole value of his succession, but where the property having devolved upon him by right, he has been kept out of some portion of it. In this case he is to be charged only with the value of the property or benefit of which he gets possession at the time of the succession; but specific provision is made for his being chargeable with duty on the property afterwards obtained by him; as to which some doubt might have arisen unless the case had been thus specially provided for.

The provisions of the 39th section are wholly inapplicable to the present case. They apply only where the value of a succession "shall not be fairly ascertainable under any of the preceding directions." That is not the case with the land in question, for it is admitted by the information that it has been ascertained to be of no annual value whatever.

The 45th section, requiring the successor in the case of real property to give notice to the Commissioners "when any duty in respect thereof shall first become payable," might, by the use of the word "first," introduce a little *doubt, and aid *278 the argument that unproductive property becoming productive would be liable to duty, and that consequently the Crown would be entitled to notice in such an event. But it appears to me that this word meets with its proper application in such sections as the 23d and 24th, with respect to timber and advowsons, and the 25th, with respect to beneficial leases, which are instances of exceptions from the general rule, contained in the 20th section, as to the liability to duty at the time when the successor becomes entitled in possession to his succession.

It was thrown out in the course of the argument that from the words in the information "the land in question was not capable of being sold or let profitably as building land," it might be inferred that it would have realized some amount at the time of the defendant becoming entitled to the succession, although it might probably be sold or let more advantageously at some future period; and it was contended that if the land had a saleable value at the time when the succession fell to the defendant, it might be charged with succession duty. The difficulty would be in what manner the amount of duty to be paid would under these circumstances be arrived at. It can hardly be supposed to have been the intention of the Legislature, that a valuable succession of this description should escape assessment altogether; and yet there would be no annual value to furnish a basis for the only mode of calculating the duty prescribed by the Act. Instead of considering "the interest of the successor," in the words of the 21st section, "to be of the value of an annuity equal to the annual value of the property," it would be necessary to ascertain the amount for which the land would sell, and then make that amount the assumed purchase-money of an annuity, to represent the duty. It appears to me that the sections 23d and 24th, as to timber *and *279

advowsons "comprised in the succession," rather favour the view that for land yielding no annual value but capable of immediately realizing a value by sale, the successor would be liable to succession duty. I do not understand that these subjects of property would have been exempt from duty but for the special provisions respecting them. The language of the section assumes that they would have been chargeable at once as "comprised in the succession." The rule as to the time and mode of charging the duty was introduced in case of the successor, who from the nature of the property might possess it as a valuable part of the succession, and yet derive no profit from it for many years.

I cannot help thinking that if the Crown had not acted upon an erroneous notice of the defendant's possible liability to duty at some future period, it would have been found that his land was not altogether valueless, and that the question might have been raised as to its liability to duty upon the marketable value as building land. But I must act upon the admission in the information, that the plots of land in question were wholly unoccupied and not capable of yielding income, fluctuating or otherwise; and upon that ground alone I have come to the conclusion that the defendant was not chargeable with duty when he became entitled to his succession, and that he cannot be charged at any time afterwards. I therefore think that the judgment of the Court of Exchequer is right, and that it ought to be affirmed.

Decree affirmed, and appeal dismissed with costs.

Lords' Journals, 3d March, 1865.

1865. March 10.

HENRY EARLE and JOHN JAMES, *Appellants*.RICHARD P. BARKER and others, *Respondents*.*Will. Residue. Power to appoint.*

A testator, after making specific devises of his property real and personal, thus provided for the disposal of his residuary estate: "As to all the residue, &c. not hereinbefore specifically bequeathed, I give, &c. to my executors, their heirs, &c. upon the trusts following," to pay debts and legacies, to permit his nephew, H. B. C., to receive the rents for life, and "after the death of my said nephew, provided he shall leave any child or children him surviving, &c., I direct that my executors, &c. shall stand seised of my said residuary estate upon trust for such persons and for such ends and purposes as my said nephew shall by his last will direct, appoint, or devise; but if my said nephew shall die without leaving any child or children him surviving, &c., and my said nephew shall not previous to his decease make any such appointment as aforesaid, then my executors shall stand possessed of my said residuary estate, &c. upon trust for B. Y. and R., their heirs, &c." The nephew died without ever having had a child, leaving a will in which he recited his uncle's will, and, declaring himself thereby entitled to appoint, he appointed the residue to E. and J.:—

Held, affirming the decision of the Master of the Rolls, that the nephew never having had a child, the condition on which the power to appoint was founded had not occurred, and the power to appoint never came into existence; that the nephew's appointment was therefore invalid; and the residuary estate went, under the uncle's will, to B. Y. and R.

FRANCIS CONST made his will on the 11th April, 1839, by which he appointed his nephew, Henry Beaumont Coles, and William Dunn and Henry Young, his executors. After the bequest of various legacies to different persons, he thus provided for the disposal of his residuary estate:—

* "And as to all the rest and residue of my estate, both * 281 real and personal, including, &c., not hereinbefore specifically bequeathed, I hereby give, devise, and bequeath the same to my said executors, their heirs, &c., upon the trusts following (that is to say): first, to pay the legacies and annuities, &c., and after payment thereof, to permit and suffer my said nephew, Henry Beaumont Coles, to take and receive the rents, dividends, profits,

and interest thereof, for and during the term of his natural life for his own absolute use and benefit, and from and after the decease of my said nephew, provided he shall leave any child or children him surviving, or who shall be born in due time after his decease, lawfully begotten, then I declare and direct that my said executors shall stand and be possessed of my said residuary estate, upon trust for such persons, and for such ends and purposes, as my said nephew shall by his last will and testament direct or appoint, give, devise, or bequeath the same; but if my said nephew shall die without leaving any child or children him surviving, or who shall be born in due time after his decease, lawfully begotten, and the said Henry Beaumont Coles, my nephew, shall not, previous to his decease, make any such appointment, gift, or bequest, as aforesaid; then I declare that my said executors shall stand and be possessed of all my said residuary estate, and of all rents, dividends, interest, and profits of or arising out of the same: Upon trust for and to be divided between the following persons (that is to say): Richard Barker, of, &c., Henry Young and James Ryland, and to and for their heirs, executors, and administrators, and I hereby give and bequeath the same accordingly."

The testator died on the 16th December, 1839, leaving all the persons above mentioned him surviving.

* 282 * Henry Beaumont Coles, who was the testator's heir at law and only next of kin, died on the 23d November, 1862, married, but never having had a child. He had made a will on the 23d November, 1861, by which he appointed Henry Earle and John James his executors, and after disposing of his own property, he proceeded to recite the will of Francis Const, and what he believed to be the true construction of that will, and he devised all that he thereby enjoyed or had the power of appointing to trustees, on the same trusts as those declared of his own residuary estate.

A bill was filed by the representatives of Richard Barker (who had died some years before Coles) against the executors of Henry Beaumont Coles and others, praying that the appointment made by Coles, in his will, of the residuary estate of Const, might be declared invalid, and that such residuary estate on the death of Coles became divisible between Barker, Young, and Ryland, their heirs, &c.

Answers were put in, and the cause was heard before the Master

of the Rolls, who made a decree in accordance with the prayer of the bill (33 Beav. 353).

This was an appeal against that decree.

Sir F. Kelly and *Mr. Hobhouse* (*Mr. Druce* and *Mr. Earle* were with them), for the appellants. — The testator's nephew, H. B. Coles, had a general power of appointment over the residuary estate, and that power was not dependent on his having or leaving a child. He is not restricted to using the power in favour of children; he may give away the whole estate from them. The possibility of his having a child was of course foreseen, and the testator intended to give him the means of providing for it; but in the event of his having none, * the words of the will * 283 left in him the general power of appointment. There were two events provided for, either of which would prevent the estate from going over; first, his having a child, and next, provided "the said H. B. Coles, my nephew, shall not, previous to his decease, make any such appointment." These words are clear, and cannot be disregarded. He did make the appointment, and under these words that appointment is valid. If validly made during Coles's life, and he is not in this latter sentence instructed to make it by will, it would not be rendered invalid by his subsequently dying without children. If the power was to be entirely dependent on Coles having children, the testator should have stopped at the words "lawfully begotten," instead of which he went on to describe the second event that was to happen before the property could go over, namely, the making of the appointment. That event has not happened, for the appointment has been made. In the first part of the will the testator Const supposes his nephew to have children, and then directs the executors to stand possessed of the estate for such ends and purposes as his nephew shall by his will appoint. Then he goes on to suppose that his nephew may die without leaving children him surviving, and then, if the nephew does not make any appointment, the executors are to stand possessed of the property for the use of the three persons named in the will. But if he had children, and made an appointment, or if he had none, and yet made the appointment, it was to take effect, and only in the event of his making no appointment was the estate to go over. Neither of the two clauses can be rejected from the will. The testator would have expressed him-

self differently if he had meant that Coles having children
 * 284 * to survive him was the condition absolutely requisite to give him power to appoint. He has not done so, and the appointment being duly made, the two events, on the happening of which two events alone the estate was to go over, not having happened, the appointment is valid.

*The Attorney-General (Sir R. Palmer) and Mr. W. M. James (Mr. Harris Prendergast, Mr. Lorence Bird, and Mr. Shebbeare were with them),*¹ for the various respondents. — Coles was only a tenant for life, with testamentary power of appointment to be exercised in the event of his leaving children or a child surviving him, but in no other event. The testator no doubt intended that if Coles should have children the residuary estate might, but not that it should, go to them, for he had a general power of appointment and might leave it to a stranger. Coles had the power to apportion it among his children, but the testator intended also that if Coles had no children, certain friends of his own should divide the estate among them. The appointment mentioned in the second sentence was the same which Coles was before authorised to make, and that was dependent on his having children who survived him. The words of reference, “such appointment as aforesaid,” show that. The words “providing he shall leave any child him surviving” govern the rest of the sentence, yet they must be rejected as wholly without meaning if the contention on the other side is to prevail. The nephew has no power to appoint except by will, and the making of the will in the first
 * 285 sentence is clearly dependent * on his having children.

The second sentence is referential, and speaks of his not doing that which the first sentence enabled them to do. It means if there should be a child, in which case the power would arise, but if that power should not be exercised, then over; but it does not confer any power if there should be no child. The power altogether depended on his having children; as he had none, the power never arose, and the gift over took effect.

Sir F. Kelly replied.

¹ As all the respondents had identical interests in the suit, the House would only hear two counsel.

March 10.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this case has been very ably argued at the bar by the learned counsel both for the appellants and the respondents.

I think your Lordships will agree with me in the conclusion that the Master of the Rolls is right in his decision. I do not by any means, for a moment, intend to suggest that the reasoning upon which his Honour arrived at that conclusion is in any respect defective or erroneous; but I think the same conclusion may also be arrived at upon rather a different view of the effect of the clause in this will upon which the question turns.

Henry Beaumont Coles is made the tenant for life. There is then given to him a testamentary power of appointment, not limited but general, and made conditional on the event of his leaving a child surviving him. The testator then takes up the event of his leaving no child surviving him, in which case of course the power of appointment previously given to his nephew would not arise, and could not be exercised; and the testator goes on to express that which I think is nothing more than an expression of what must be the consequence of his leaving no child surviving him.

* That conclusion may be arrived at by reading the words *286 either in the manner suggested by the counsel on behalf of the respondents at the bar, or in the manner suggested by the Master of the Rolls. The testator says, "If my nephew shall die without leaving any child him surviving," and so on. That is, as I have already observed, a description of the event on the occurrence of which no testamentary power could arise. And if I am right in that, the same conclusion may also be drawn if we take the words following the word "and," which contain a reference to the antecedent power, and make them expressive of this event, which is an event that will take in all possible occurrences. If there should be no child the power would not arise. But there might be a child and yet the power might not be exercised. It is a very natural interpretation of the words, to hold that the testator in this second clause meant so to express himself. If the power shall not arise, that is, if there be no child, or if the power having arisen, it shall not be exercised.

In order to arrive at that conclusion, inasmuch as the words following the word "and" contain a reference to the antecedent

power, we have nothing else to do than to substitute for those words a reference to the entirety of the antecedent power, and then the words thus shortly expressed will extend the referential construction, and will be equivalent to this form of expression: And if the said Henry Beaumont Coles shall have a child him surviving, but shall not previously to his decease make any such appointment, gift, or bequest, as aforesaid. Whether, therefore, the sentence which I have read be taken as the Master of the Rolls has taken it, namely, as an expression of that which must be the consequence of there being no child living at the death of Henry Beaumont Coles, or whether the words be taken as intending to denote the case of there being a child, but the power not being ex-

* 287 exercised, * in either mode of construction the conclusion is arrived at, that the gift over must take effect. I admit that of the two constructions I undoubtedly prefer the latter, which gives effect to the whole of the sentence, and makes no portion of the will of no effect or surplusage, but by a very natural interpretation makes the testator express himself thus: If there should be no child, in which case there would be no power, or if there shall be a child but the power shall not have been exercised, then the gift over shall take effect.

It follows, therefore, that the conclusion of the Master of the Rolls is right, and it may be arrived at by either mode of interpretation, either that which has been adopted in the decree at the Rolls, or that which has been suggested at the bar by the counsel for the respondents. This being so, I think your Lordships can come to no other conclusion than to affirm the decision of the Court below.

With regard to the costs of this appeal, I would submit to your Lordships whether in a case of this nicety, they should not, if they can, be given out of the residuary estate of the testator.

LORD CRANWORTH. — The only question of importance to the parties is, whether the decision of the Master of the Rolls gives this property to the proper persons. In my opinion it clearly does so.

My noble and learned friend has pointed out that there are two modes by which that conclusion may be arrived at. One of those is, to adopt the suggestion of Sir Hugh Cairns in the Court below, which is to understand “and” as if it were written “and

also in case." I own when I * first read the will, it struck * 288 me that that was the fairest way of interpreting it, but, upon further consideration (differing in that respect from my noble and learned friend as to the mode in which I arrive at the correctness of the conclusion), I think that the Master of the Rolls' interpretation is the most sound. I am rather inclined to think, with him, that the will must not be read as if there were inserted therein the words "and also in case" "the said Henry Beaumont Coles shall not, previous to his decease, make any such appointment, gift, or bequest as aforesaid," because by construing it in that manner, that is, as suggested by the Master of the Rolls, if Henry Beaumont Coles had left a child, the gift over would not have taken effect. No doubt in that case there would have been an intestacy which really in the view of the Court might have carried the property to the child of the nephew, his heir at law, who was the first object of his bounty.

With regard to the very ingenious suggestion which has been made upon the part of the appellants, that an implied power is to be supposed here, I cannot accept that construction, because that would really make the sentence so unnecessarily cumbrous, that such a thing cannot be supposed to have been the intention of the testator. It would have been, in fact, to make him say this: If my nephew shall leave a child or children him surviving, or who shall be born in due time after his decease, lawfully begotten, then I declare that my executors shall stand possessed of, &c. upon trust for such persons as my nephew shall by his will appoint; but (this is putting an alternative case) if my nephew shall die without leaving any child or children, then I give to such persons as my nephew shall by will appoint. It is impossible that the * testator could have had that in his mind; at least so it * 289 appears to me.

I concur with my noble and learned friend in thinking that the judgment of the Master of the Rolls must be affirmed.

As to the costs of this appeal, I agree that they should come out of the testator's estate.

LORD CHELMSFORD. — My Lords, I agree with my noble and learned friends, but I very greatly doubt whether we are carrying out the real intention of the testator. If I was asked what he intended, I should say that he probably meant in the event of his

nephew leaving children to give him a power of appointment to leave the residuary estate amongst his children, and in the event of his leaving no children it was intended to give him a general power of appointment. But the answer to these conjectures is, *quod voluit non dixit*. It is a universal rule in the construction of a will, that no words in a will are to be rejected to which any meaning can be given. Therefore if the words of reference "make any such appointment, gift, or bequest as aforesaid," cannot be struck out of the will, they can only refer to the single power which is given, which is a power in the event of his leaving children; and there being such a power, any other power cannot be implied from the words of the will. Then the event has not arisen upon the happening of which the power was to be exercised, for he did not leave children. Undoubtedly the appointment which he has made is not an appointment under the will, there being no power to make that appointment. Therefore, my Lords, under these circumstances, the opinion of the Master of the Rolls is perfectly correct, and I agree with my noble and learned friends that

* 290 his judgment must be * affirmed. I agree also that the costs should come out of the testator's estate.

*Decree affirmed; costs to be paid out of the residuary estate of the testator Francis Const.*¹

Lords' Journals, 10th March, 1865.

¹ The Master of the Rolls had made a similar direction, on the ground that the original testator himself had created the difficulty, 33 Beav. 362.

TAPLING v. JONES.

1865. February 17, 20, and 21 ; March 16.

THOMAS TAPLING, *Plaintiff in Error*.HUGH JONES, *Defendant in Error*.¹

Lights. Obstruction. Windows. Easements. Invasion of Privacy. Restoration. 2 & 3 Wm. 4, c. 71.

The right to ancient lights now depends on statute (2 & 3 Wm. 4, c. 71), and so does not require, and ought not to be rested on, any prescription or fiction of a license.

Therefore, as the statute declares it to be absolute and indefeasible, it cannot be lost by a temporary intermission not amounting to abandonment, nor can it be forfeited by any attempt to extend the right.

"The right to obstruct a new light" is an unmeaning expression. The right is that of a man to use his own land, though his so using it may obstruct the light received through the window of an adjoining house.

Invasion of privacy by opening a window which overlooks another man's grounds, is not recognised by law as a wrongful act.

The opening of a new window, being in itself an innocent act, cannot therefore destroy existing rights in one party, or give new, or revive old rights in another.

Consequently, where there was an ancient light, and then others were added, and an obstruction was raised against the added lights, which from their position could not be obstructed without obstructing the ancient light, such obstruction was illegal.

Renshaw v. Bean, 18 Q. B. 112, and *Hutchinson v. Copestake*, 8 C. B. N. S. 102, 9 C. B. N. S. 863, overruled.

THIS was an action for obstructing lights, brought by Jones against Tapping. The plaintiff, in the first count of his declaration, alleged a right to the access of light * 291 and air through certain ancient windows in a building. The count went on and stated for breach that the defendant, by wrongfully building and continuing a wall, prevented such access of light and air. In a second count he alleged a right to the unobstructed access of light and air to the said window, but that the same was obstructed by a wall continued by the defendant.

The defendant pleaded, first, not guilty ; secondly as to the first

¹ *Staffordshire Canal Navigation v. Birmingham Canal Navigations*, Law Rep. 1 H. L. 260.

count of the declaration, that the plaintiff was not possessed of a building in which there were ancient lights ; and, thirdly, that the plaintiff was not possessed of a building with windows, through which the light and air ought to have entered as alleged. The plaintiff took issue on these pleas.

The cause was tried at Guildhall before Lord Chief Justice Cockburn, on the 14th February, 1859, when a verdict was taken for the plaintiff, subject to a case, which was to be settled by Mr. Serjeant Hayes.

The case stated in substance the following facts : The plaintiff was a silk mercer, and at the time of the action carried on business at Nos. 107, 108, and 109, Wood Street, Cheapside. He had been in possession of Nos. 108 and 109 for several years. They were on the west side of Wood Street, and abutted in the rear or eastward, on premises belonging to the defendant, numbered 1 to 8, and called the Gresham Street property. In 1852 the plaintiff pulled down Nos. 108 and 109, and erected on their site new warehouses, in doing which he altered the position, and enlarged the dimensions of the windows previously existing, increased the height of the buildings, and set back the rear line of them so as to approach nearer to the defendant's premises.

In the year 1857 the plaintiff became possessed of No. 107, which up to that time had been a public-house, known
 * 292 * as the " Magpie and Pewter Platter," and which possessed ancient windows, entitled to access of light and air from an open space (belonging to the defendant, and called " Flying Horse Court "), situated between the plaintiff's and defendant's premises. On obtaining possession of No. 107, the plaintiff began to make alterations in it, in order to make the floors of all his premises correspond with each other. He lowered the first and second floors, and lowered the windows in them to agree with the floors. One of the windows was brought down about one foot lower than before ; the other was about the same size as the old one, and both occupied parts of the old apertures. One small window in the first floor was blocked up. He also built two additional stories, in the first of which he opened a new window, and in the other he placed a window extending across the whole width of the building. These new windows were so situated that it was impossible for the owner of the Gresham Street property to obstruct or block them without also obstructing or blocking, to an equal or

greater extent, that portion of the windows in the new building which occupied (but with an enlarged space) the site of the ancient windows in the "Magpie and Pewter Platter." The plaintiff's alterations were completed August, 1857.

At the end of the year 1856 the defendant had pulled down the buildings then standing on the Gresham Street property in order to erect thereon a warehouse; and in 1857, after the plaintiff's buildings had been completed, the defendant proceeded to erect his warehouse, and built up the eastern wall thereof to such a height as to obstruct the whole of the windows and lights in the premises of No. 107. This wall was completed by the end of October, 1857.

On the subject of these buildings a correspondence took place between the attorneys for the plaintiff and defendant * during the months of September and October, 1857; each * 293 insisted that the other was exceeding his rights, and notices of opposition were mutually given.

Before the 4th February, 1858, the plaintiff, by the advice of counsel, caused the altered windows in the building formerly the "Magpie and Pewter Platter," to be restored to their original state as to size and position, and the new windows in the new portion of the building to be blocked up, by filling up the spaces with brick work. On that day Jones's attorney gave notice to Tapping to pull down the wall he had erected, and "restore Jones's premises to their former light and air." The case found that "the new windows of No. 107 could not have been obstructed in a more convenient manner than by building up a wall of sufficient height on the defendant's premises."

The case was argued before the Court of Common Pleas in Hilary Term, 1862, when the Judges differed in opinion, Lord Chief Justice Erle and Mr. Justice Williams being in favour of the plaintiff, Mr. Justice Byles and Mr. Justice Keating in favour of the defendant.¹ The last-named Judge, as the youngest member of the Bench, withdrew his opinion in order that judgment might be entered, and the case taken to a Court of error.

Upon error in the Exchequer Chamber in the Trinity Term, 1862, there was again a difference of opinion among the Judges, but by a considerable majority the judgment given for Jones, the plaintiff below, was affirmed.² The present proceeding in error was then brought.

¹ 11 C. B. N. S. 283.

² 12 C. B. N. S. 826.

The Attorney-General (Sir R. Palmer) and Mr. Archibald, for the plaintiff in error.—The theory of the law as to an * 294 easement or a servitude * before the Prescription Act,¹ was that some grant might be presumed as its origin. Evidence of uninterrupted user was taken to establish this presumption. It is clear therefore that the presumption could not be made to extend to a state of things different from that shown by the user to have existed and been allowed. Assuming a grant: a man may grant one thing; he may grant the opening of one window which he has the power to block up, but that does not give the right to open others after the time for recalling the grant for the first has gone by. Nor may the grantee of a window of a certain size, under similar circumstances, make it of a much larger size. The alteration destroys the identity, and puts an end to the presumed grant. As the statute proceeds on the principle of a grant, the rules which would relate to a grant must be applied to the statutory confirmation of the easement. If so, the excess here justifies the erection of the obstruction. A man may protect himself against new easements, and if he cannot do so but by affecting old ones, especially when they have been made use of as the means to procure the new, he may obstruct all. As to such a matter, the act of a tenant will not conclude his landlord, nor even a succeeding tenant, *Daniel v. North*,² *Barker v. Richardson*.³ *Bright v. Walker*⁴ adopted the same principle after the Prescription Act as had been laid down in those cases before it. And the Prescription Act itself, 2 & 3 Wm. 4, c. 71, appears to adopt the same principle, for in both the second section, which relates to rights of way and to water, and in the third section, which relates to lights, the words are “actually enjoyed,” which cannot be truly said of any thing that is in its nature and extent something * 295 very different from the thing that has * been actually enjoyed. It is plain in principle that the right to obstruct exists as against a change, for the change is a new creation; it is the creation of a new easement.

*Luttrell's Case*⁵ at once illustrates and supports these arguments, for it shows that though, where there is no substantial change, as in the case of estovers supplied to a hall, and the conversion of the

¹ 2 & 3 Wm. 4, c. 71.

² 1 Cramp., M. & R. 211.

³ 11 East, 372.

⁴ 4 Rep. 87.

⁵ 4 B. & Ald. 579.

hall into a parlour, the old prescription may continue, it will not continue if prejudice is by the change brought upon the person who is assumed to have made the grant of the estovers.

The earliest of the cases on lights is *Cherrington v. Abney*,¹ where it is said "they cannot make more stories nor more lights, nor make them in other places." It appears there that one trial had been had and another was directed, but there is no further account of that case. But in *Comyns's Digest*² the case is stated thus: "An action upon the case does not lie if the defendant prevents an excess in the plaintiff in using his right; as if A. had lights in an ancient house, and he rebuilds his house and make lights in other places, and larger, to the inconvenience of the plaintiff." In *Martin v. Goble*³ it was held at Nisi Prius that a malt house with ancient windows having been converted into a workhouse, it was not entitled to more light in its new use than it had enjoyed in its old; and on that ruling there was no attempt to disturb the verdict. In *Cotterell v. Griffiths*⁴ it was held that where a man had light through blinds, and he pulled them down and so obtained an unobstructed view into the defendant's garden, the defendant was not justified in erecting a fence which had the effect of diminishing the amount of light which had been enjoyed * while the blinds existed, but that was simply because the * 296 open space remained as before, the alteration being only in the mode of admitting the light.

In *Dougal v. Wilson*,⁵ Lord Chief Justice Wilmot, after declaring that a possession of sixty years gave an indefeasible right to lights, so that an action could be maintained if they were obstructed, went on thus: "But the action can only be maintained for damages so far as the lights originally extended, and not for an increase of light by enlarging the windows recently." The case of *Chandler v. Thompson*⁶ decided that if an ancient window be enlarged, the adjoining owner cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, though more light and air are admitted through the unobstructed part of the enlarged window than were formerly received; but that is quite consistent with saying that the part which is not ancient might be obstructed, and in that respect the

¹ 2 Vern. 646.

⁴ 4 Esp. 69.

² Tit. Action on the Case. Nuisance (C).

⁵ 2 Wms. Saund. 175.

³ 1 Campb. 322.

⁶ 3 Camp. 80.

case is very little different from that of *Cotterell v. Griffiths*. If it is thought to go further, it is certainly not reconcilable with the cases in Banco. In *Thomas v. Thomas*,¹ a case not itself in point, for it decides only the effect of unity of possession, there is a dictum of Mr. Baron Alderson which will be much relied on by the other side. He says,² "If a party enlarges an ancient window, only the enlarged part of it can be obstructed by the owner of the adjoining land, and the light of the ancient part cannot be diminished." That dictum, confined as it is in expression, may be admitted. A window merely enlarged may retain all its ancient light except as to the enlarged part, but that will not show that if the ancient window is employed, as it has been here, to be the

* 297 means * of rendering it impossible to obstruct the excess, it is protected. It must in truth mean the reverse ; for if the enlarged part may be obstructed, as the dictum implies, it may be so even though the obstruction necessarily, and, through the wrongful act of the dominant owner himself, inevitably, affects the ancient light. It does not show that in such a case nothing but the part in excess can be obstructed. If it is intended to mean that if an ancient window is used, as it has been here, to obtain the means of creating new lights, it cannot be obstructed in order to obstruct them, it is wrong.

Then came the case of *Garritt v. Sharp* ;³ that was an action for obstructing open windows in a malt house which had formerly been a barn, and which while a barn possessed only spaces partly open. Evidence as to the amount of light admitted had been rejected, and the Court granted a rule for a new trial, in doing which it was said "a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether." That was followed by *Blanchard v. Bridges* ;⁴ there the owner of a house enlarged it and converted what were alleged to have been ancient windows into windows of a different shape and size, and, though looking in the same direction, not being placed in the same situation ; it was held that whatever privilege against the obstruction of light the windows of the original house possessed, the privilege did not apply to the new windows. In an elaborate judgment delivered by Mr. Justice Patteson, on behalf of the whole Court, it is said,⁵ "In whatever way precisely the right

¹ 5 Tyrr. 804. .² 8 A. & E. 325.³ 4 A. & E. 191.⁴ 5 Tyrr. 810.⁵ 4 A. & E. 176.

to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), * still the act of the owner of such land from which the * 298 right flows, must have reference to the state of things at the time when it is supposed to have taken place"; and he goes on to work out that proposition, and to show that the right to have a window of a certain size, and elevation of position, cannot give the right to have a new one varying in all these respects from the original, declaring that "the consent cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions, and in the same position), which existed at the time when such consent is supposed to have been given."

This brings down the cases to that of *Renshaw v. Bean*,¹ which is directly in point with the present. There the plaintiff was the reversioner of a house which adjoined the defendant's premises, and had ancient windows. He rebuilt the house and added an upper story, opened windows in that story, enlarged the ancient windows, and altered their position. The defendant, within twenty years aforesaid, rebuilt his premises, and to a greater height than before, and thereby darkened the windows of the plaintiff in both the upper and lower stories of the plaintiff's house. It was held, that the plaintiff having by his alterations exceeded the limits of his right, and it being, through the nature of such alterations impossible for the defendant, in the lawful exercise of his own rights, to obstruct such excess without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right, at all events until he restored his house to its original condition. The principle there distinctly asserted is, that in rebuilding a house which possesses established easements, they cannot be made use of to create new * ease- * 299 ments. That principle is the correct one, and is in accordance with all the cases decided up to that time. It would be most unjust if it were otherwise. It cannot be pretended that because A. permits B. to gain by sufferance a particular right, the right thus gained shall be made the means of securing him another which he never would have been permitted to enjoy had his attempt to obtain it been, in the least degree, anticipated. *Wilson v. Townsend*² followed *Renshaw v. Bean*, and adopted the principle

¹ 18 Q. B. 112.

² 1 Drewry & S. 324.

there laid down; and, in *Cooper v. Hubbuck*,¹ the Master of the Rolls in noticing what he considers to be the principle deducible from the various cases says, that twenty years' undisturbed possession gives a man the right to the easement over his neighbour's land: but how? "limited to the extent to which he has for twenty years enjoyed it"; and he adds, "If a man obtains a right to light or air over his neighbour's land, through a particular window, he cannot by reason of that open another window." That was followed by the case of *Hutchinson v. Copestake*,² where the same principle was adopted, though Mr. Baron Bramwell added that he gave his judgment on the ground that, in fact, no one of the new windows exactly occupied the place of the old. In *Weatherley v. Ross* * Vice-Chancellor Wood followed the decision in *Renshaw v. Bean*. Then came the present case. In the Court of Exchequer Chamber *Renshaw v. Bean* was freely discussed. Mr. Justice Crompton distinctly affirmed the rule it laid down, "that where the owner of the dominant tenement has opened new lights, so that the owner of the servient tenement cannot prevent the right to the new lights from being gained as

* 300 * against him without obstructing the old, he is allowed to obstruct and excused for obstructing the old, so long as, and to such an extent as, is necessary for him to do, in order to prevent the usurpation of the new lights"; and he said that this arose from the very peculiarity of our law with regard to lights. Mr. Justice Wightman adopted the reasoning of Mr. Justice Crompton. Mr. Baron Bramwell dissented. He says, "if one builds on his own land, whether close or near to his neighbour or not, whether with or without windows, he confers no new right on the latter." That is true. The latter may build up and obstruct at once; but if he does not, but allows twenty years to elapse, he loses his old right. The correct statement would have been not that the neighbour overlooking whose land a window was opened had no new rights conferred upon him, but that if he did not within a certain time obstruct the window, he lost his old right. The inattention to this distinction runs through the whole judgment, and leads into various fallacies. There the building of a wall with fifty windows is said not to be "a wrongful act" — admitted — but it is one the effect of which his neighbour may immediately defeat; but if

¹ 30 Beav. 160.

² 8 C. B. N. S. 102, in Error, 9 C. B. N. S. 863.

* 1 Hem. & M. 349.

the neighbour chooses for twenty years to allow the existence of the fifty windows, he confers a new right on the man who opened them — a right in derogation of the free enjoyment of his own property — and for that very reason one which ought not, against his will, to be afterwards made the means of still further derogating from its enjoyment. Acquiescence is, in fact, consent; but, suppose consent in form to be given, surely the man who gets a consent to open a certain window cannot on that ground justify the opening of a dozen others. [THE LORD CHANCELLOR. — We had better emancipate the question from consent, and put it simply upon occupation. A man * who opens a window * 301 complains of its being obstructed, of an obstruction of what he has long enjoyed. The answer is, you have done that which you had no right to do; you have long enjoyed something else, but not this; and I have a right to prevent your enjoyment of this, though by so doing I may interfere with that which you have long enjoyed. Is that a sufficient answer?] It is. In *Gale on Easements*¹ it is said, “If such increased enjoyment would clearly narrow the servient owner’s original right of building or otherwise acting on his own property, his tenure is damnified”: and he shows the difficulty that would be thereby imposed on the servient owner in asserting his undoubted rights. Mr. Justice Blackburn’s remarks prove how well this observation is warranted, for he goes the length of saying that where an obstruction was erected against the new and unprivileged easement, if, even from the absolute necessity of the case, it interfered with the old and privileged easement, it was not lawful; and he therefore came to the conclusion that *Renshaw v. Bean* was not well decided. That reasoning is in contradiction to all the old authorities, and is not in accordance with the principles of law or the practices and habits of men. It is not therefore sufficient to overthrow the old authorities, all of which are on the first point in favour of the appellant.

The second point is whether, after the restoration of the plaintiff’s windows to their old condition, the defendant is bound to remove the obstruction which he had erected against the new windows. With respect to that it must be admitted that even of those judges who thought the obstruction lawful, Lord Chief Justice Erle, Mr. Justice Williams, Mr. Justice Crompton, and Mr. Justice Wightman, were of opinion that when the * cause, * 302

¹ 3d ed. 497.

the new windows, which had justified the raising of the obstruction, had been removed, the obstruction itself ought to be removed. *Moore v. Rawson*¹ shows that there may be the loss of an ancient right. It seems clear in point of principle that if the right to obstruct existed — if the putting in of the new windows gave the right to obstruct the old, in order to prevent the new from acquiring the same right as the old, then the obstruction being at first lawful, the removal of the cause which justified it could not make it, retroactively, unlawful. The unlawful act of the plaintiff operated to deprive him of his old right. That which was right at the time it was done by one party, cannot be made wrong by an *ex post facto* act of the other. *Liggins v. Inge*.² The case of *Stokoe v. Singers*³ illustrates this point, that after an interruption to the use of an easement, the only right of the person who formerly enjoyed it is to return to it under that state of things which formerly existed; so that if the owner of the servient tenement exercises his rights upon an apparent abandonment of the easement, he cannot afterwards be made to recede from what he had at the time lawfully done. In *Gale on Easements*,⁴ the result of the authorities is thus summed up: “Upon the second question, ‘whether a party is still at liberty to restore his tenement to its former condition, and recur to his former enjoyment,’ there is no express authority in the English law. It should seem, however, that he would have no such right, as he would clearly have evinced an intention to relinquish his former mode of enjoyment; and, in addition to the actual encroachment, the uncertainty caused by the at-

* 303 tempted extension of the right would of itself *impose a heavier burden upon the owner of the servient tenement, if such return to the original right were permitted.” [THE LORD CHANCELLOR. — Suppose I have a right to water in a narrow circle, and I destroy that and make it ten times larger, and the party affected complains, and I restore it to its original extent, have I lost my original right to the water?] Yes; if in the mean time there has been any act done by the other party to assert his right in opposition to that usurpation; *Gale on Easements*,⁵ referring to the Civil Law. And where the owner of the servient tenement has done such an act, founded on such a belief, he cannot be made to recall the act. Otherwise he might build up a house after a right

¹ 3 B. & C. 332.² 8 Ellis & B. 31.³ 3d ed. pp. 483, 484.⁴ 7 Bing. 682.⁵ 3d ed. p. 500.

to an easement had been lost or abandoned, and then be compelled to pull down his house if the dominant owner reclaimed his right to the easement. Such a state of the law would be most unsatisfactory. If the excess here was permanent, as it appeared to be, the defendant had a right to make the obstruction of it permanent, and the plaintiff had no right by a change of purpose, and by treating the excess as merely temporary, to compel the defendant to remove the permanent obstruction, *Stokoe v. Singers*,¹ from which even Mr. Justice Blackburn does not dissent, for he says, "I agree with what was there said, that when the owner of the ancient light induces the owner of the land to act upon the belief that he has permanently abandoned his right, he is precluded from saying that he did not intend to abandon the right, and the right is gone, whatever might be the real intention."

Sir Hugh Cairns and *Mr. Cleasby*, for the defendant in error, were not called on.

* THE LORD CHANCELLOR (LORD WESTBURY). — By the * 304
3d section of the Act 2 & 3 Wm. 4, c. 71, intituled, "An Act for shortening the time of prescription in certain cases," it is enacted, "That when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose, by deed or writing."

Upon this section it is material to observe, with reference to the present appeal, that the right to what is called an ancient light now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be

¹ 8 Ellis & B. 31.

found that error in some decided cases has arisen from the fact of the Courts treating the right as originating in a presumed grant or license.

It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible, and it would seem therefore that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandon-

* 305 ment. Moreover * this absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification ; nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated.

Before dealing with the present appeal, it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead ; one of these expressions is the phrase " right to obstruct." If my adjoining neighbour builds upon his land, and opens numerous windows which look over my gardens or my pleasure grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour.

Again, there is another form of words which is often found in the cases on this subject, namely the phrase " invasion of privacy by opening windows." That is not treated by the law as a wrong for which any remedy is given. If A. is the owner of beautiful gardens and pleasure grounds, and B. is the owner of an adjoining piece of land, B. may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and A. has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly erected manufactory.

If in lieu of the words " the access and use of light to and
 * 306 for any dwelling-house," in the 3d section of the * statute, there be read, as there well may, " any window of any dwelling-house," the enactment (omitting immaterial words) will run thus, " When any window of a dwelling-house shall

have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible."

Suppose then that the owner of a dwelling-house with such a window, that is with an absolute and indefeasible right to a certain access of light, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of so building on his land; but it must be remembered that he possesses no right of building so as to obstruct the ancient window; for to that extent his right of building was gone by the indefeasible right which the statute has conferred.

Believing this to be the sound principle, I cannot accept the reasoning on which the decisions in *Renshaw v. Bean*¹ and *Hutchinson v. Copestake*² were founded. The facts in those two cases were not exactly the same as in the present; for in neither was any ancient window preserved unaltered; but the old windows had been enlarged, and new ones added, in which state of things it was held, that inasmuch as it was not possible for the adjoining proprietor to obstruct the new windows, and the excess beyond the ancient lights, without at the same time obstructing the original apertures, the owner of the house with those windows must be considered as having lost his right to the ancient lights, at all events until he restored his house to its original condition.

* According to these cases the law must be thus stated, * 307 namely, If the owner of a dwelling-house with ancient lights, opens new windows in such a position as that the new windows cannot be conveniently obstructed by an adjoining proprietor without obstructing the old, he, the adjoining proprietor, is entitled so to do, at all events so long as the new windows remain. Upon examining the judgments it will be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed; and the Court asks whether he can complain of the natural consequence of his own act. I think two erroneous assumptions are involved in or underlie this reasoning: first, that the act of opening the new windows was a wrongful one; and secondly,

¹ 18 Q. B. 112.

² 8 C. B. N. S. 102, in Error, 9 C. B. N. S. 863.

that such wrongful act is sufficient in law to deprive the party of his right under the statute. But, as I have already observed, the opening of the new windows is in law an innocent act, and no innocent act can destroy the existing right of the one party, or give any enlarged right to the other, namely, the adjoining proprietor.

In the present case an ancient window in the plaintiff's house has been preserved and remained unaltered during all the alterations of the building, and the access of light to that window is now obstructed by the appellant's wall. A majority of the Court below has held that the obstruction was justified whilst the new windows which the plaintiff some time since opened, remained, but was not justifiable when those new windows were closed, and the house, so far as regards the access of light, was restored to its original state. But on the plain and simple principles I have stated, my opinion is that the appellant's wall, so far as it obstructed the access of light to the respondent's ancient un-
 * 308 altered window, was an illegal * obstruction from the beginning ; and I have great difficulty in acceding to the reasoning that this permanent building of the plaintiff in error was a legal act when begun and completed, but has subsequently become illegal through a change of purpose on the part of the defendant in error. On such a principle the person who opens new lights might allow them to remain until his neighbour, acting legally, according to these judgments, has, at great expense, erected a dwelling-house, and then, by abandoning and closing the new lights, might require his neighbour's house to be pulled down. I think the judgment ought to be affirmed, but not on the ground, or for the reasons given by the majority of the Judges in the Courts below ; I therefore move your Lordships that the judgment of the Court below be affirmed.

LORD CRANWORTH. — My Lords, the question raised by the special case is whether the plaintiff in error was justified in erecting opposite and near to the house of the defendant in error, a building which prevented the access of light and air through ancient windows through which light and air had been accustomed to pass to the house in question without interruption.

Previously to the erection by the plaintiff in error of the buildings complained of, the defendant in error made extensive altera-

tions in his house, and in so doing opened new and enlarged old windows; and it was not disputed that the plaintiff in error was justified in obstructing the new and the enlargements of the old windows. He effected this obstruction by erecting a permanent building on his own land so near to the house of the defendant in error as to obstruct the whole of his lights, the old as well as the new. The special case finds as a fact that * it was * 309 impossible for him to obstruct or block the new windows without at the same time obstructing or blocking that portion of the windows and lights which occupied the site of the ancient windows. And his counsel argued, on the authority of *Renshaw v. Bean*,¹ that in these circumstances he had a right to erect the building in question.

After it had been so erected, the defendant in error caused the altered windows to be restored to their original state, and he also filled up with brickwork the spaces occupied by the new windows; and having done this, he called on the plaintiff in error to remove the building which thus blocked up the ancient, and only the ancient windows. This application was not complied with, and thereupon the defendant in error brought his action in the Court of Common Pleas against the plaintiff in error for obstructing his ancient lights.

At the trial a verdict was found for the plaintiff in error, subject to a special case, which was afterwards argued before the Court of Common Pleas; and that Court being equally divided in opinion, the junior Judge, following the usual practice, withdrew his opinion, and judgment was then given for the plaintiff, the now defendant in error, according to the opinions of what was thus made the majority of the Court. The case was then brought to the Court of Error, where the judgment below was affirmed, four of the six learned Judges who heard the case concurring in opinion with the Court of Common Pleas in favour of the defendant in error, and two dissenting. The case was then brought by writ of error to this House, and the plaintiff in error was heard at the bar. We did not call on the defendant in error to support his case, being of opinion that the * plaintiff in * 310 error had laid no ground for disturbing the judgment below; though our opinion was not founded on the same ground on which the Judges below seem to have proceeded.

¹ 18 Q. B. 112.

The case raised two questions: First, whether the plaintiff in error was justified in erecting the building whereby the access of light and air to the house of the defendant in error was obstructed; and secondly, if he was, then, whether he was bound to remove it after the windows of the defendant's house had been restored to their ancient condition.

Having arrived at the conclusion that the plaintiff in error had no right to erect the building complained of, the second question does not arise; and I will therefore proceed to state shortly the grounds on which my opinion rests.

The right to enjoy light through a window looking on a neighbour's land, on whatever foundation it might have rested previously to the passing of the 2 & 3 Wm. 4, c. 71, depends now on the provisions of that statute. The 3d section enacts — [His Lordship read it].

The special case finds that the windows of the house of the defendant in error, previously to the alteration made by him in 1857, were ancient windows; by which we must understand windows through which he had enjoyed access of light and air without interruption for twenty years. His right, therefore, to that light was by the express provision of the statute, absolute and indefeasible. It is not disputed that when the plaintiff in error erected his wall he obstructed the light to which the defendant in error was entitled, and so prevented him from enjoying what the statute declares was his absolute and indefeasible right.

The plaintiff in error, in justification of the course he
 * 311 * took, relies on the fact, that before he raised his wall, and so caused the obstruction complained of, the defendant in error had made material alterations in his house, enlarging the old windows and adding new ones. There was nothing to make it unlawful for the plaintiff in error to obstruct the access of light to these new windows, and to so much of the altered old windows as did not occupy the old site through which light had formerly passed; and as it was impossible to do this without at the same time obstructing the light which had previously passed through the old windows (so, at least, we must take the fact to be), the plaintiff in error contends that he had a right to obstruct the whole.

I am unable to comprehend the principle on which such a claim can rest. Where a person has wrongfully obstructed another in the enjoyment of an easement, as, for instance, by building a wall

across a path over which there is a right of way, public or private, any person so unlawfully obstructed may remove the obstruction; and if any damage thereby arises to him who wrongfully set it up, he has no right to complain. His own wrongful act justified what would otherwise have been a trespass. But this depends entirely on the circumstance that the act of erecting the wall was a wrongful act, whereas the opening of a window is not an unlawful act. Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest; and if by so doing he obstructs the *access of light to the new windows, he is doing that *312 which affords no ground of complaint. He has a right to build, and if thereby he obstructs the new lights, he is not committing a wrong. But what ground is there for contending that, because his building so as to obstruct a new light would afford no ground of complaint, therefore, if he cannot so build without committing a trespass, he may commit a trespass? I can discover no principle to warrant any such inference.

I will put this case: suppose the owner in fee simple of close A. were to build a house at the edge of close A., with windows overlooking close B., held by a friend as tenant for life, who, from feelings of kindness, would not object to the opening of the windows of the new house. At the end of twenty years he would, according to the 3d and 7th sections of the Act, have acquired an absolute and indefeasible right to the access of light across close B. It surely cannot be contended that the remainder-man, because he could not otherwise prevent the owner of the house from acquiring this right, might before the expiration of twenty years come on the land of the tenant for life, and there erect a building to obstruct the light of the new windows. And yet the argument of the plaintiff in error must go this length, for there is no difference in principle between a trespass on the soil and any other trespass.

In the case now under discussion, the new windows were opened by the same person who had a right to access of light through the

old windows; but this might have been otherwise. Suppose the owner of an ancient window on a first floor not to be the owner of the second floor, and that the owner of that floor should open a window which the owner of the adjoining land could not obstruct without at the same time obstructing the ancient

* 313 * light on the first floor. No one, I suppose, would agree that in such a case the owner of the land overlooked could obstruct the ancient light; and yet I can see no difference in principle between the two cases. It may be said that, in the case I have just put, the owner of the ancient light was in no default, and could not be affected by the act of a stranger. But neither is he in any default when he opens a new window himself. He does what he lawfully may do; and if the act done is lawful, I do not understand how the consequence can be different when it is the act of a stranger. If after the owner of the second floor had opened a new window, and within twenty years the owner of the first floor had purchased the second floor, would the continuance by him of the new window authorise the neighbour in obstructing the old light if he could not otherwise obstruct the new one? This will hardly be contended. So again, suppose the owner of the first floor to have demised the second floor to a tenant, and that he, without the license of his landlord, opens the new window. This might entitle the landlord to complain of his tenant as having been guilty of waste; but it can hardly be contended that it would justify the neighbour in obstructing the ancient light enjoyed by the landlord. So again, if the landlord had given his permission to the tenant to open the window, I cannot see any difference which this would make; the tenant would, *quoad hoc*, be unimpeachable of waste, but it would be lawful to the landlord to give such a permission which could not in any respect affect the relative rights of the landlord and his neighbour.

Suppose the owner of a house has a right of way to the door of his house over his neighbour's land, a case put by Mr. Justice Blackburn in his judgment, the argument of the plaintiff

* 314 in error would go to show that if * the owner of the house should put a pane of glass in his door, his right of way would or might be at an end; for it would be lawful for the neighbour to obstruct it if he could not otherwise obstruct the light.

I will not, however, multiply illustrations. The plain principle seems to me to be, that no one can interfere with the absolute and

indefeasible right of another, unless where such interference is made necessary by the wrongful act of the party possessing the right.

I do not attempt to disguise from myself that, unless the facts of this case can be distinguished from those in *Renshaw v. Bean*, the conclusion at which I have arrived is directly at variance with the decision of the Court of Queen's Bench in that case. But I own I think that the facts there were substantially the same as those now before us, and the Court decided there that the obstruction of the ancient light was in such a case justifiable. Lord Campbell, in delivering the judgment of the Court in that case, stated that the Court did not proceed on the ground that the plaintiff, whose ancient lights were obstructed, had lost the right which he had previously enjoyed of having light and air through such portions of the new windows as had formed portions of the ancient windows. But his Lordship added, "If by the alterations which the plaintiff made he exceeded the limits of that right, and so put himself into such a position that the excess could not be obstructed by the defendant without at the same time obstructing the former right of the plaintiff, he has only himself to blame." The observations I have already made sufficiently indicate the reasons on which I cannot assent to this reasoning; and unless that reasoning be sound the judgment cannot be supported.

The case of *Renshaw v. Bean* was followed in that of **Hutchinson v. Copestake*; not only in the Court of Common *315 Pleas, where the decision of the Court of Queen's Bench was considered to be binding, but also in the Exchequer Chamber, though there some of the Judges seem to have proceeded on the special facts of that case. It is, however, the duty of this House, as the ultimate Court of appeal, to lay down the law on what are considered to be correct principles. And though we should be slow to decide contrary to the decisions of the Courts of Westminster Hall, where they have been long received and acted on, even if we see cause to question the grounds on which they were supposed to rest, yet no such principle ought to restrain us from correcting what we deem to have been an erroneous decision pronounced only thirteen years ago; more especially when we have, as in this case, the opinions of two very learned Judges expressing their decided dissent from it, and when we think we can discover in the judgments of the Chief Justice of the Com-

mon Pleas, and of Mr. Justice Williams, great doubts, to put it no higher, of the soundness of the decision which we are overruling.

My clear opinion is, that the judgment below ought to be affirmed.

LORD CHELMSFORD. — My Lords, I agree with the judgment of the Court of Exchequer Chamber, but on different grounds from those on which it proceeded.

The only parts of the special case which are necessary to be noticed are, that in making the alterations in his house, which originally consisted of three stories, with one window in each story, the respondent altered the windows in the two lower stories, but

so as to make them both occupy part of the old apertures,
* 316 and retained the * window in the third story unaltered, and

built two additional stories, in each of which he opened a new window. That after these alterations were completed, the appellant, who had previously made preparations for erecting a warehouse on the site of some old buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in the respondent's buildings, it being impossible (as the special case states) for the appellant to obstruct or block up the upper windows without obstructing or blocking up the portion of the windows or lights which occupied the site of the ancient windows. The special case also states that the new upper windows could not have been obstructed in a more convenient manner (by which I understand more convenient for the appellant), than by building up a wall of sufficient height on his premises. After the appellant's wall was finished the respondent caused the altered windows in his building to be restored to their original state, and the new windows in the upper stories to be blocked up, and then called upon the appellant to pull down his wall and restore to the respondent's premises their former light and air. The appellant refused, and thereupon the action was brought.

Upon this state of facts two questions have been raised: first, whether the appellant can justify the obstruction of the ancient lights in the respondent's house, on the ground that it was otherwise impossible for him to obstruct the new lights. Secondly, supposing him to have this right, whether it continued after the necessity for its exercise ceased, by the discontinuance of the new lights.

The first question brings directly into review before this House the decision of the Court of Queen's Bench in the case of *Renshaw v. Bean*,¹ which in its circumstances * (as stated *317 by Lord Campbell in his judgment) closely resembles the present case. The Court there held that the "plaintiff having by the alterations which he made exceeded the limits of his former right, and put himself into such a position that the excess could not be obstructed by the defendant in the exercise of his lawful rights on his own land, without at the same time obstructing the former right of the plaintiff, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had, at all events until he should, by himself doing away with the excess, and restoring his windows to their former state, throw upon the defendant the necessity for so arranging his buildings as not to interfere with the admitted right."

In this statement of the grounds of decision, the word "right" does not appear to be used with appropriate precision and accuracy. It is not correct to say that the plaintiff, by putting new windows into his house or altering the dimensions of the old ones, "exceeded the limits of his right," because the owner of a house has a right at all times (apart, of course, from any agreement to the contrary) to open as many windows in his own house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour; but of this species of injury the law takes no cognizance. It leaves every one to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows. But as it would be hard upon the owner of a house to which the free access of light and air had been permitted for a long period, to continue for ever indebted to the forbearance of his neighbour for its enjoyment, * the Courts of law, upon the principle of quiet- *318 ing possession, formerly held that where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner, or, in other words, that he had by some agreement restricted himself in the otherwise lawful employment of his own land. The Prescription Act, 2 & 3 Wm. 4, c. 71, turned this pre-

¹ 18 Q. B. 112.

sumption into an absolute right, founded upon user on one side and acquiescence on the other.

It was argued on behalf of the appellant that under this Act the right to the enjoyment of lights was still made to rest on the footing of a grant. I do not see what benefit his case would derive from the establishment of this position; but it appears to me to be contrary to the express words of the statute. The 3d section enacts that when the access or use of light shall have been actually enjoyed for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the Prescription Act, then, after twenty years' user of lights, the owner of them acquires an absolute and indefeasible right which so far restricts the adjoining owner in the use of his own property that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted. As to every thing beyond, the parties possess exactly the same relative rights which they had before. The owner

of the privileged window does nothing unlawful if he
 *319 *enlarges it, or if he makes a new window in a different situation. The adjoining owner is at liberty to build upon his own ground so as to obstruct the addition to the old window, or to shut out the new one; but he does not regain his former right of obstructing the old window which he had lost by acquiescence, nor does the owner of the old window lose his former absolute and indefeasible right to it, which he had gained by length of user. The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises.

It will, of course, be a question in each case, whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and should the owner of the previously existing window restore the former state of things, he

could not compel the removal of any building which had been placed upon the ground during the interval; for a right once abandoned is abandoned for ever. But the counsel for the appellant carried their argument far beyond this point. The part of the case which is the most difficult for them to encounter is that which relates to the unaltered window in the third floor. As to this, they contended that the alteration of the windows below, and the addition of the windows above, so changed the character of the previously acquired right to light and air as entirely to destroy it. But it is not easy to comprehend how this effect can be produced by acts wholly unconnected with an ancient window which the owner has carefully retained in its original state. And the learned

*counsel did not seem to expect much success from their *320 argument in its application to the unaltered window, but directed it with more plausibility to the alterations of the windows in the lower floors. As to these, they contended that the owner of ancient windows is bound to keep himself within their original dimensions, and that if he changes or enlarges them in any way, although he retains the old openings in whole or in part, he must either be taken to have relinquished his right or to have lost it. But upon what principle can it be said that a person by endeavouring to extend a right must be held to have abandoned it, when, so far from manifesting any such intention, he evinces his determination to retain it, and to acquire something beyond it? If under such circumstances abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture.

It must always be borne in mind that it is no unlawful act for the owner of a house to open a new window, or to enlarge an ancient window, although in the latter case some difficulty may be thrown upon an adjoining owner to distinguish the old part from the new, and so to ascertain which part he has a right to obstruct, and which is privileged from his obstruction. The alterations may be of such a nature (as in the present case) as to make it impossible for him to prevent the further restriction of his liberty to build on his own premises, without at the same time interfering with the right previously acquired against him. Yet it would be a very strange extension of the law of forfeiture to hold that the owner of an ancient window, doing nothing but what he may lawfully do, loses his existing right because it stands in the way of the means of interfering with an act against which the owner

* 321 of the adjoining land would otherwise * have been able and would have been entitled to defend his property. Even supposing what was done by the respondent amounted to an unlawful encroachment, the question put by Mr. Baron Alderson, in *Thomas v. Thomas*,¹ appears to be unanswerable. "How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim?" But the Court of Queen's Bench, in the case of *Renshaw v. Bean*, held that because the respondent, in the exercise of his lawful rights on his own land, could not obstruct (what was there called) "the excess of the plaintiff's former right, without obstructing that former right, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had." This doctrine appears to me to be founded neither upon principle nor upon authority. It amounts to this: The plaintiff having acquired an absolute right to ancient windows against the defendant, does an act which it was lawful for him to do, subject to the right of the defendant to render it useless; but because he has contrived his measures so as to prevent the defendant hindering the attempt to obtain a new right without destroying, or at least suspending, the exercise of the old, therefore the old right may be lawfully interrupted, if indeed it is not altogether lost.

It may be said (and this was urged in argument at the bar) that unless such is the law, a person who has an ancient window may acquire a right to any number of additional windows by so contriving their position as to place them completely under the protection of the ancient window, and thus effectually prevent the adjoining owner's interference with them. Undoubtedly this * 322 is a * very possible case; and yet there does not appear to be any thing unreasonable or unjust in denying, even under such circumstances, a power over the ancient lights which did not previously exist. For, consider the case upon the presumption of a grant as it stood before the Prescription Act. The rights of the parties would of course be taken to be regulated by such grant, and it would have been contrary to principle to permit the grantor to derogate from his own grant merely because he could not otherwise prevent an act which might prejudicially affect him, but which the grantee was not prohibited from doing by law. And precisely the same consequences seem to follow from the right being now

¹ 2 Crompt. M. & R. 39.

acquired by user and acquiescence. While the user is ripening into a right, the adjoining owner has the power completely in his own hands. If he has no objection to the particular window, but is desirous of preventing any enlargement or alteration of it, or any new windows being opened, he may inform his neighbour of his determination to build up against the window unless he will enter into an agreement not to enlarge or alter it, nor to open any new one without his permission. The adjoining owner can therefore always protect himself by a little vigilance; and if he allows rights to be acquired under shelter of which he is prevented using his land for the purpose of defence against the acts of his neighbour, he must blame his own want of foresight and precaution, and not the law, which will not permit an ancient right to be invaded upon any such assumed ground of necessity. I am therefore of opinion that the case of *Renshaw v. Bean* cannot be supported, and that the appellant cannot justify the erection of his wall, and the consequent obstruction of the ancient lights on the respondent's building.

The determination of the first question in the respondent's * favour renders it unnecessary to consider whether * 323 the respondent had a right to insist upon the removal of the appellant's wall after he had restored his windows to their original state. In the view which I have taken, it is impossible for me to deal with the second question in the way in which it has been treated in the Court of Common Pleas and in the Exchequer Chamber. If I had been of opinion that the acts of the respondent conferred upon the appellant the power of interfering, for however short a time, with the right of the respondent, I should have been compelled, as a consequence, to hold that the obstruction could not be rendered temporary by any subsequent act of the respondent, because a right once lost can never be revived. But it is unnecessary to dwell upon this point, because after the decision of this case, the question can never again be raised. The judgment of the Exchequer Chamber ought to be affirmed.

Judgment affirmed.

Lords' Journals, 16th March, 1865.

JELLICOE v. GARDINER.

1865. February 24; March 14.

ELIZABETH J. JELLICOE, *Appellant*.Sir JOHN B. W. SMYTHE GARDINER, *Respondent*.*Will. Shifting Clause. "Issue."*

A. so devised his estate of G. that no female issue of any son of B., his first devisee, could take or inherit. B. being himself possessed of another estate of C. H., and having succeeded to the G. estate, made a will by which he devised his original estate C. H. to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into

* 324 possession of the estate devised by A.; but that as * often as such estate of A. should come to the possession of any of his (B.'s) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (B.'s) will, should be entitled to the C. H. estate; and so from time to time, as often as the event might happen, in such manner and as if the person so becoming possessed of the G. estate had died, or was then dead, without issue":—

Held, that "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," and excluding them alone from taking under those limitations. The effect of the shifting clause was therefore simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder.

IN December, 1861, the respondent brought an action of ejectment against the appellant, to recover possession of an estate called the Clerk Hill estate, situate at Whalley, near Blackburn, in the county of Lancaster, which he claimed under the wills of Sir William Gardiner and of Sir James Gardiner. The cause was tried before Mr. Justice Mellor, at the Liverpool Spring Assizes, in 1862, when a verdict was found for the defendant, but leave to move was reserved. A rule having been obtained, the facts were turned into a case.

Sir James Whalley Smythe Gardiner, called "the testator," and also called Sir James Gardiner No. 1, had been, up to 1797, James Whalley, of Clerk Hill, Esq. At that time he succeeded to the possession of the Gardiner estates and to the baronetcy. He was

twice married ; in 1784, to Elizabeth Assheton (who died in 1785), and again, in 1789, to Jane Master. By his first wife he had one son, who became Sir James Gardiner No. 2. By his second marriage he had four sons, Robert, William, John Master, and Thomas (the last died in infancy), and several daughters, of whom the appellant was the eldest.

* By the will of Sir William Gardiner, of Roche Court, * 325 in the county of Southampton, Sir James No. 1 held the Gardiner estates. That will was made in 1778, and gave the Gardiner estates to certain trustees, to the use of the heirs of the body of Sir William, and, in default, to John Whalley (afterwards Sir John Whalley Gardiner, the elder brother and predecessor of Sir James No. 1) for life ; remainder to his first and other sons in tail male, subject to a proviso, shifting the estate in case the said John Whalley, or any of his sons, should become entitled, for life or in tail, to certain lands devised by the will of one Bernard Brocas ; remainder to the use of James Whalley Gardiner (afterwards Sir James No. 1) ; remainder to the use of the first and other sons of James ; remainder to the use of his younger brother Thomas William and his sons in tail male ; remainder, in a similar order of succession, to the first and other daughters of John, James, and Thomas William in tail male ; remainder to the use of the right heirs of John Whalley. Sir William died in 1779, and John Whalley entered into possession of the title and estates. He died in 1797, without issue, on which James Whalley, in like manner, succeeded to the Gardiner title and estates. On the 2d of July, 1796, this Sir James (the testator) executed a will by which he devised Clerk Hill estates to trustees in trust to settle and convey to his eldest son, James Whalley, for life, without impeachment, &c. ; remainder to trustees, to preserve (this remainder was regularly repeated throughout the will) remainder to the first, second, third, fourth, fifth, and all and every other son of the body of the said James Whalley successively in tail male ; remainder, in like manner, to his second son, Robert Whalley, and his sons ; remainder in the testator's third son, John Master Whalley, and his sons ; remainder, in like manner, to all the other sons of * the testator hereafter to be born severally and succes- * 326 sively ; remainder to the sons of James, Robert, and John Master Whalley in like succession in tail general, " with remainder to the use of the first, second, third, fourth, fifth, and all and every

other the daughter and daughters of the body of my eldest son James Whalley, severally and successively in tail male"; remainder to the daughters of Robert Whalley and John Master Whalley; remainder to the daughters of these sons in tail general; "remainder to the use of Elizabeth Jane, my eldest daughter, and her assigns for and during the term of her natural life without impeachment," &c. This Elizabeth Jane is now Mrs. Jellicoe, the appellant.

After some other provisions came a shifting clause which recited the will of Sir William Gardiner and declared the testator's desire that "my said estates hereinbefore directed to be settled and conveyed shall not be held or enjoyed so long as I may legally prevent them, consistent with the limitation hereinbefore mentioned, &c., by any one of my sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, shall come into possession of the estates, &c., limited by the will of Sir William Gardiner; but as often as the estates, &c., limited by the will of Sir William Gardiner, shall come to the possession of any of my said sons or daughters, or any of their issue, that then the person next in remainder, according to the limitations, &c. to my said estate, &c., after the person who shall so come to the possession of the lands, &c., so as aforesaid limited and devised by Sir William Gardiner, shall be entitled to and come to the possession of my said estates, &c., for the estate and interest hereinbefore limited to him or her respectively; and so from time to time, as often as the event now in my contemplation may happen, in
 * 327 such manner * and as if the person or persons so becoming possessed of the estate, &c., devised by the will of Sir William Gardiner had died, or was then dead, without issue. And the uses for which my said estates are directed to be conveyed shall accordingly cease, determine, and shift, from time to time, so as that the two several estates, the one formerly belonging to Sir William, &c., and the other now belonging to me, may never, so long as I may legally prevent the same, consistent with the limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed, &c., be holden or enjoyed in possession, by any of my sons or daughters, or his, her, or their issue, together and at the same time, but, on the contrary, in manner and form hereinabove mentioned."

This Sir James Gardiner (No. 1) died in 1805, and his eldest

son Sir James Gardiner (No. 2), entered into possession of the Gardiner estates. He did nothing to affect the entail.

Robert Whalley, the eldest son of Sir James No. 1 by his second marriage, entered into possession of the Clerk Hill estate. On coming of age he filed a bill against his half-brother, Sir James No. 2, against James the eldest son, then an infant, and all other necessary parties, praying that it might be declared that he was entitled to an immediate estate for life in the Clerk Hill estate, with remainder to his first and other sons in tail male, and that the trustees named for that purpose in the will of Sir James Gardiner No. 1 might convey accordingly.

On the 24th of May, 1813, Sir W. Grant, the Master of the Rolls, made a decree in accordance with the prayer of the bill, and the required conveyance was executed under the direction of the Court of Chancery. Robert was made to take the legal estate for life, with remainder * to his sons in tail male, * 328 with remainder over in the line according to the will.

In March, 1814, the present respondent, the second son of Sir James No. 2, was born, and succeeded to the Gardiner estates and to the baronetcy on the death of his father, which happened on the 22d of October, 1851, his elder brother James having died in 1837, during the lifetime of their father.

Robert Whalley, William Whalley, and John Master Whalley, successively entered into possession of the Clerk Hill estates, and died without doing any thing to bar the entail, and without ever having had issue. The last named died 27th October, 1861, and Mrs. Jellicoe then entered into possession.

Sir John B. Whalley Smythe Gardiner, the present baronet, brought ejectment against her, contending that on the true construction of the will of Sir James, the testator, he was entitled to the Clerk Hill estates.

On the argument of the case in the Court of Common Pleas on the 12th of July, 1862, the rule for entering a verdict for the plaintiff was, by a majority of the Judges, made absolute.¹ This decision was afterwards unanimously affirmed in error in the Exchequer Chamber in July, 1863.² The present appeal was then brought.

Sir H. Cairns and Mr. Manisty (Mr. Udall was with them), for

¹ 12 C. B. N. S. 568.

² 15 C. B. N. S. 170.

the appellant. — The intention of the shifting clause will be defeated if the respondent should be declared entitled to the possession of the Clerk Hill estates. The object of the testator was to prevent them and the Gardiner estates from going in the same line. When they were to come to the same person,
 * 329 * that person being a stirps, he and his issue were to be struck out of the will, in the same way and to the same extent as if he was then dead and had died without issue. The latter part of the expression shows that the issue as well as the stirps were to be excluded. The will was to be read as if there had not been any limitation to that person and his issue, until the happening of the ultimate limitation, when, of course, there being no further reason for keeping the estates divided, any one person who was entitled in ultimate remainder might take both. The case of *Carr v. The Earl of Erroll*¹ is in point here, and it was misapprehended by the Lord Chief Justice of the Common Pleas, when he supposed that the will there “contained clear words rendering the issue of the tenant for life incapable of taking the devised estate after it should have shifted from the tenant for life under the clause in that will.” The clause is almost in terms like the proviso here. *Doe v. Heneage*² is not in point.

It was also contended that the title of the defendant in error, if ever it arose at all, arose in 1837, on the death of the elder brother James, more than twenty years before the commencement of the suit, and was consequently barred by the Statute of Limitations; and further, that the deed of 1814 had not converted any of the executory trusts created by the will of Sir James No. 1 into legal estates, except those created in favour of Robert Whalley and his sons in tail male; and consequently that the claim of the respondent was one which could not be enforced in a Court of law.

The Attorney-General (Sir R. Palmer) and Mr. Mellish (Mr. Quain was with them), for the respondent, were not called on.

* 330 * THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, at the date of the will of Sir James Gardiner the testator, the Gardiner estates stood limited under the will of Sir William Gardiner to Sir John Whalley Smythe Gardiner for life;

¹ 6 East, 58, 75.

² 4 T. R. 13.

remainder to his first and other sons in tail male; remainder to the use of Sir James, the testator, for life; remainder to his first and other sons in tail male; remainder to the use of the first and other daughters of Sir John in tail male; remainder over. Under these limitations no female issue of any son of Sir James could take or inherit.

By the will of Sir James Gardiner, the testator, the Clerk Hill estates were devised to trustees in fee upon trust, to convey the same to the use of the testator's eldest son, James, for life; remainder to trustees, to preserve contingent remainder; remainder to the first and other sons of James in tail male; remainder to the testator's second son Robert for life; remainder to trustees to preserve contingent remainder; remainder to the first and other sons, of Robert in tail male; remainder to the testator's third son, John Master Whalley, for life; remainder to trustees to preserve; remainder to his first and other sons in tail male; remainder to every other son of the testator successively in tail male; remainder to the first and other sons of the testator's eldest son James, in tail general; with similar remainders in tail general to the first and other sons of the second, third, and every other son of the testator in tail general; with remainder to the first and other daughters of the testator's first and every other son in tail male; with remainder to the use of Elizabeth Jane, the testator's eldest daughter, for life, with divers remainders over. This Elizabeth Jane is the present appellant.

Pausing for a moment, and contrasting the limitation * of these two wills, it is apparent, First, that if James, the * 331 eldest son of Sir James the testator, had daughters and no son, such daughters would not take under the limitations of the Gardiner estate, but would take the Clerk Hill estates severally and successively in tail male in remainder, anterior to the limitation to the appellant for life. Secondly, it is apparent that if the eldest son of the testator's first son James did not bar the entail, and died leaving daughters only, such daughters would take nothing under the limitations of the Gardiner estates, but would inherit under the limitation in remainder of the Clerk Hill estates to their father in tail general.

We now come to the shifting clause contained in the will of Sir James. By that clause the testator Sir James declares his will and mind to be, that his devised estates should not be held or en-

joyed by any one of his sons or daughters, and his, her, or their issue, after such son or daughter, or such his, her, or their issue, should have come into possession of the estates devised by the will of Sir William Gardiner; but that as often as the estates devised by the will of Sir William should come to the possession of any of his (Sir James's) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (Sir James's) will, should be entitled to his devised estates for the estate thereby limited to him or her, and so from time to time as often as the event might happen, in such manner and as if the person so becoming possessed of the Gardiner estate had died, or was then dead, without issue.

It is plain, from the first part of this clause, that the word "issue" denotes and is limited to such issue as might take
 * 332 or inherit under the limitations of the Gardiner * estates, which would not include the daughters of Sir James's first son, or the female issue of a grandson. It is reasonable to put the same meaning upon the word "issue" in the subsequent phrase, "had died, or was then dead, without issue"; for the testator plainly contemplates that the Gardiner estates would be the supervenient estate, and that the shifting clause would be called into operation by the Gardiner estate accruing under the will of Sir William Gardiner, to some person taking the Clerk Hill estate under his own will. And as the guiding intent and object are to prevent unity of possession, the word "issue" ought not to be extended so as to include issue not capable of taking or inheriting under the limitations of Sir William Gardiner's will. But further: it is the object of the clause to propel the Clerk Hill estates from the devisee who shall succeed to the Gardiner estates, to the person next in remainder, under the limitations of the Clerk Hill estates; and the words, as if such devisee "had died, or was then dead, without issue," are used for this purpose, and denote the assumption or hypothesis necessary for effecting it. But it would be unreasonable to give the words a meaning beyond what is necessary for the intent and object with which they are used. So limited, they denote such issue as would take under the limitations anterior to the devise to "the person next in remainder," and exclude them only from taking under those limitations.

I agree with one of the learned Judges in the Court below, that but for Sir William Grant's decree, the words "had died, or was

then dead, without issue," ought to be read as applicable distributively to the case of tenant for life and tenant in tail. But that construction is negatived by the decree, inasmuch as the son of Sir James No. 2 was made a party to the suit for the purpose of * contending that by reason of his father having * 333 succeeded to the Gardiner estates, the Clerk Hill estate was propelled to himself as next in remainder. But it seems to have been decided, and apparently on the words "was then dead without issue," that the case must be treated as if Sir James No. 2 had died without leaving any issue inheritable under the limitation to his first and other sons in tail male; and therefore the words, "was then dead without issue," were held to apply to the case of a tenant for life of the Clerk Hill estates becoming entitled to the Gardiner estates. Accordingly, the decree declares Robert (being the second son of the testator Sir James), to be entitled to have the Clerk Hill estates settled on himself for life, without impeachment of waste, save as in the will mentioned, with remainder to Robert's first and other sons in tail male, with such remainders over as are contained in the will of the testator Sir James with respect to the said estates; a declaration which expressly treats all the estates limited by the will of Sir James the testator, in remainder expectant on the estate of Robert, as valid and capable of taking effect; and therefore the estates in remainder limited by the will to the first and other sons of James No. 2 in tail general, and also the estates limited in remainder to the first and other daughters of Sir James No. 2. in tail male, are treated by the decree as still subsisting and capable of taking effect; which would not be the case if, under the shifting clause, Sir James No. 2 must be considered as having died without issue male or female.

The deed of release and settlement follows the decree, and converts the equitable life estate of Robert Whalley, and all other the estates limited by the will of Sir James the testator, in remainder therein, into legal estates. The point, therefore, now raised by the present appellant is * inconsistent with this decree * 334 and with the deed of release, which was settled in the Master's office under the direction of the Court. The consequences of holding that the words "was then dead without issue" have a larger signification than what is required to pass on the Clerk Hill estate to the next devisee in remainder, would be very unreasonable. Thus, according to such construction, if Sir James No. 2

had daughters only, such daughters, although not inheritable to the Gardiner estates, would be deprived of the power of taking the Clerk Hill estate under the express gift to the first and other daughters of Sir James No. 2 in tail male. And so also the first son of James No. 2 would be deprived of the estate given to him in remainder in tail general, by which his female issue would lose the right to inherit the Clerk Hill estate, although they could never take the Gardiner estates under the limitations in the will of Sir William. Thus, express estates given by the will of Sir James the testator would be taken away and defeated by a construction, put on the elastic word "issue" in the shifting clause, not required for the object and proper operation of the clause, which ought not to be extended beyond its declared intent and purpose. I have examined with great care the learned and able judgment of Mr. Justice Williams; but I think the reasons for putting a limited meaning on the words "without issue" in the shifting clause predominate.

Two other objections were faintly urged by the appellant; one founded on the Statute of Limitations, and the other on an allegation that the respondent had not the legal estate. With respect to the Statute of Limitations, the argument is at variance with the decree of Sir William Grant, for it must be founded on the construction that, when the Clerk Hill estate passed from

* 335 'James * No. 2 as tenant for life, it vested in his eldest son,

James Whalley Smythe Gardiner, who died unmarried on the 11th of October, 1837, when the respondent's title accrued, being twenty years before the action of ejectment. But this is not in accordance with the true construction; for the respondent claims under the limitation in remainder to the first and other sons of Sir James No. 2 in tail general. And with respect to the other suggested difficulty, it seems clear that the whole of the legal estate was conveyed, by the trustees of Sir James the testator, to uses correspondent with the trust estates declared by his will of the Clerk Hill estates, in remainder expectant on the estate for life given to his second son, Robert.

I therefore humbly move your Lordships to affirm the judgment, and to dismiss the appeal with costs.

LORD CRANWORTH. — My Lords, the direction contained in the shifting clause is, that as often as the Gardiner estates should, by virtue of the will of Sir William, come to the possession of any of

the testator's sons or daughters, or any of their issue, then the person next in remainder under the limitations of his will should take the Clerk Hill estate as if the person so succeeding to the Gardiner estates had died without issue. The testator speaks of the Gardiner estates devolving on any of his sons or daughters. This could not have happened, for those estates were devised only to sons in tail male; but the clause may be read as if sons and their issue had alone been mentioned.

The question is, what issue is contemplated by the testator under the words "had died without issue." I think, certainly, that issue which stood, under the limitations of the will, in order before the next remainder-man, and so would, but for the shifting clause, have prevented him from *succeeding. There is no *336 intention, expressed or implied, to alter the limitations, except so far as was necessary for preventing the two estates from coalescing under the limitations of the two wills. And when, therefore, the respondent became entitled to an estate tail under the limitations of the will, subsequent to that under which the remainder-man had taking by virtue of the shifting clause, there was nothing in the language of the will preventing him from taking the Clerk Hill estate, for he was not in possession of the Gardiner estate, — at all events, was not in possession of it under the will of Sir William, — the possession of which was obviously the sole motive influencing the testator to direct that his own estates should go to younger branches of his family.

With respect to the question of the legal estate, I entertain no doubt whatever. The whole of the will, and all its limitations, are set out *in extenso*, by way of recital, in the conveyance executed under the authority of the Court of Chancery; and though no other uses are in express terms declared except those to Robert, the son, for life, and to his first and other sons in tail male, this was probably done merely to avoid unnecessary prolixity, the other uses being sufficiently indicated by the general expressions referring to them as previously set out.

I therefore concur with the Lord Chancellor in thinking that the judgment below ought to be affirmed.

LORD CHELMSFORD concurred.

Judgment affirmed; and appeal dismissed with costs.

Lords' Journals, 14th March, 1865.

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* ROBERTS v. BRETT.

1865. February 13, 14; March 16.

JULIUS ROBERTS, *Plaintiff in Error.*

JOHN W. BRETT, *Defendant in Error.*

Contract. Condition precedent. "Forthwith."

What is or is not a condition precedent, depends, not on merely technical words, but on the plain intention of the parties, to be deduced from the whole instrument.

A. entered into a contract with B., by which A. was "forthwith" to bring a vessel alongside a particular wharf, and within seven days of his doing so, B. was to pay a sum of 1000*l.*; a further sum of 2000*l.* in twenty-one days afterwards; and another sum of 2000*l.* on the ship arriving at the Nore. Certain penalties were to be payable by A. for non-performance of specified acts. There were several other stipulations, and after all came a covenant by which "for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties which he might incur under these presents, A. and two responsible sureties were 'within ten days from the execution of these presents,' to execute a bond to B. in the penal sum of 5000*l.*" There was a covenant in exactly similar terms on the part of B. The giving of the bond was not to prejudice their mutual rights and liabilities under the agreement:—

Held, that the covenant to give the bonds was a condition precedent, so that on B.'s refusal to allow A. to ship the cable, A., who had not given his bond, could not maintain an action for damages in respect of such refusal.

The covenants to give the bonds were not mutual and dependent; the fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract.

"Forthwith," in this contract, meant a reasonable time.

If the ship had been brought alongside on the day after the execution of the contract, and if the 1000*l.* had thereon been paid, A. would not have been thereby exempted from the obligation to give his bond within the ten days.

THIS was an action for damages for breach of a contract under seal entered into on the 15th of May, 1855. The defendant represented "The Mediterranean * Submarine Electric Telegraph Company," and on its behalf entered into a contract with the plaintiff to lay down 150 miles of cable between Cape Tabaque, on the northern coast of Africa, and Cape Spartivento, in the island of Sardinia.

The declaration stated that by a certain indenture, &c., entered into on the 15th May, 1855, the plaintiff, for the considerations

therein mentioned, covenanted with the defendant "that he, the plaintiff, should and would forthwith, at his own expense, procure the 'Cornwall frigate,' or some other suitable vessel, and stow or cause to be stowed on board the said vessel the submarine telegraphic cable, which was one hundred and fifty miles in length, and was then at Morden Wharf, Greenwich, &c., and also should and would, at the like expense, fit out, &c. the said vessel, and provide competent officers and crew, and place on board sufficient breaks and rollers, &c., and would, to the extent of 600*l.*, pay the expense of insuring the cable, and several other things; and should and would "have the ship fully equipped in all respects and ready for sea at the Nore on or before the 15th of July then next." There were several other acts which the plaintiff undertook to do. And if he made default in having the ship with the cable on board fully equipped and ready for sea before the 15th of July then next, the defendant should be at liberty to retain from any moneys payable by him, as and for liquidated damages, 200*l.* per week, and at that rate for any less period than a week; but the power to enforce this payment by way of liquidated damages "should be without prejudice to the right of the defendant to exercise any other powers or remedies at law or in equity, by virtue of these presents, or the bond thereafter referred to for enforcing the completion of the works before covenanted to be done, or for compensating * himself for the damage occasioned by * 339 such default." And the defendant covenanted with the plaintiff that "he, subject to such rights of deduction, would pay the plaintiff 5000*l.* by the instalments and at the times next mentioned, that is to say, the sum of 1000*l.*, part thereof, on or before the expiration of seven days after the arrival of the vessel alongside Morden Wharf," the sum of 2000*l.* twenty-one days after such arrival, and 2000*l.* when the ship should put to sea from the Nore; and at the expiration of twenty-one days from the time when the cable should have been laid down, the defendant covenanted to deliver to the plaintiff five hundred paid-up shares in the company of 10*l.* each. And then "it was agreed and declared that for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days after the execution of these presents, give and execute to the defendant, his executors, &c., a bond in the

penal sum of 5000*l*. And for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors, &c., a bond in the penal sum of 5000*l*." And it was agreed and declared that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff or the defendant.

The declaration then averred that the plaintiff did procure a vessel and fit it out, and was ready and willing to provide the officers and crew, and to perform all the acts covenanted to be performed, and to have the ship ready for sea at the Nore * 340 before the 15th of July; but before * the time arrived for so doing, the defendant refused to perform the contract, and dispensed with the vessel being brought alongside the wharf; and the plaintiff alleged that he had performed all conditions stipulated on his part, and that every thing had taken place to entitle him to a performance by the defendant, of all which premises the defendant had notice, and was requested to stow the cable on board, &c., and for doing all which matters and things a reasonable time had elapsed before the commencement of this suit, yet that the defendant did not nor would stow, or allow to be stowed, the cable, &c., but wholly refused, &c., and stowed the cable on board another ship or vessel and thereby broke his contract. And the plaintiff further assigned for breach that the defendant did not, within ten days, &c. execute the bond,¹ but therein made default.

The defendant pleaded first, except as to the giving of the bond (an exception repeated in each of the other pleas but the fifth), that the plaintiff did not procure a suitable ship, &c., and place the same alongside Morden Wharf as alleged. Secondly, that he did not fit out the ship as alleged. Thirdly, that the plaintiff was not ready and willing to provide and pay the officers and crew as alleged: and, Fourthly, that the plaintiff did not within ten days from the execution of the indenture (such ten days expiring before the plaintiff placed the ship alongside the Morden Wharf), or at any time give and execute, nor within the ten days procure two responsible sureties to give and execute, &c., a bond in the penal sum of 5000*l*. for the true performance by the plaintiff of the other

¹ This was a new breach, added after the first argument on the demurrer. See 6 C. B. N. S. 611, 618.

covenants in the indenture contained, and according to the meaning and effect of such *indenture. Fifthly, as to the * 341 breach of covenant by the defendant, so excepted as aforesaid, the defendant paid into Court the sum of one shilling.

The plaintiff took issue on the first, second, third, and fifth pleas.¹ On these pleas issue was joined. On these issues of fact, the cause was tried in June, 1858, at Guildhall, and a verdict for 2300*l.* was found (on all the issues), for the plaintiff.

The plaintiff demurred to the fourth plea, and the defendant joined in demurrer. On this demurrer, judgment was given for the defendant (18 C. B. 561), which judgment was affirmed in the Exchequer Chamber. This proceeding in error was then brought.

Mr. Bovill and *Mr. Massy Dawson* (*Mr. Beasley* was with them), for the plaintiff in error. — It must be assumed on these pleadings, that the plaintiff was able to perform the work undertaken by him in this contract, and that he did perform it as far as in him lay, was a fact found by the jury. There is in the declaration an allegation of request to the defendant, and refusal by him to stow the cable. The declaration is therefore good. On the other hand, there is in the plea no allegation of request to the plaintiff, and refusal by him to give the bond. The plea is therefore bad. Besides, the covenants as to giving the bonds were mutual and dependent, and the defendant could not allege that the plaintiff did not give his bond without himself alleging that he was ready and willing to give his bond.

The proper construction of the contract is the question * now to be considered. The intention of the parties must * 342 decide it. What is the first stipulation in the contract? It is that the plaintiff shall “forthwith,” at his own expense, procure the “*Cornwall frigate*,” or some other suitable ship, and stow the cable on board. And the first stipulation by the defendant is that he will pay the plaintiff the sum of 1000*l.*, part of the whole sum of 5000*l.* “on or before the expiration of seven days after the arrival of the vessel alongside Morden Wharf,” 2000*l.* more on the expiration of twenty-one days after that time, and the remaining 2000*l.* as soon as the ship had put to sea from the Nore. There is nothing which justifies the argument that the bonds were to be

¹ The original pleadings were amended, see 6 C. B. N. S. 611, 618; they are here stated as they appeared when the case was brought up to this House.

given before any one of these acts was performed, or that if the first of them had been performed, the 1000*l.* would not have been payable, and that no action would have lain for its nonpayment. Nor is there any thing which justifies the argument that the work, which was the object of the contract, was to be delayed till after the giving of the bonds.

The stipulation is, that the plaintiff shall "forthwith" bring the ship alongside Morden Wharf. He might have done so the next day; if he had, must it have lain there uselessly till the expiration of the ten days given for the delivery of the bonds? It is absurd to suppose that the parties had any such intention. If the ship had been brought there within twenty-four hours of the signing of the contract, that would have been a performance of the stipulation within the meaning of the word "forthwith," a word which certainly does not, in any way, imply delay, but quite the reverse. In the Court below it was assumed that the plaintiff would not be liable to do what he undertook, and that the stipulation respecting the bond was to be a security against that,

* 343 but the contract * does not warrant that assumption, and there is no plea alleging that he was requested to bring the ship alongside, and failed to do so.

If the plaintiff was under an obligation to give the bond before beginning to perform the work, so was the defendant. The covenants to give bonds are mutual, and dependent on each other. In that respect each party is in default, and cannot set up the default of the other in his own defence. But the absence of the bond cannot affect the working of the contract. If the obligation of the defendant to give his bond was not a condition precedent to any thing being done under the contract, how could the giving of a bond by the plaintiff deserve that character? It might be that non-performance of an act by one contractor would be an answer to an action by the other, but that would not show that the act was a condition precedent; for example, in an action by the buyer of goods for non-delivery, the seller might aver that the plaintiff was not ready and willing to accept, and dispensed with the delivery of the goods, and proof of the plea might discharge the seller from his liability on the contract, but yet there would be no condition precedent in the case, *Pordage v. Cole*, and the notes,¹

¹ 1 Wms. Saund. 819*l.* 320 *d.* n. 3, citing *Boone v. Eyre*. See also the notes to *Cutter v. Powell*, 2 Sm. Lead. Cas. 13-15.

which show that where covenants are in form independent of each other, and the breach of any one of them may be compensated in damages, an action may be maintained for a breach of one without averring performance of the others. Suppose the plaintiff had laid down the cable, could it be said that he could not recover because no bond had been given. [LORD CHELMSFORD. — He might, for work and labour.] It is clear that though the parties agreed to give bonds as further securities, they did not intend to prevent other modes of * remedy. There is an express * 344 clause to that effect in the indenture. If there were ten things to be done, and nine were performed, it was not the meaning of the parties that the non-performance of one should invalidate the whole contract.¹ *Stavers v. Curling*² is in point. There A. undertook a whaling voyage, and covenanted to do certain things, on doing which the defendant covenanted to pay him a certain share of the profits. The Court held that these covenants were independent, and that the performance of them all was not a condition precedent to an action on the defendant's covenant. So in *Boone v. Eyre*,³ the principle was established that where a covenant goes only to part of the consideration on both sides, and the breach of it may be compensated in damages, it is an independent covenant and cannot be treated as a condition precedent. [LORD WENSLEYDALE. — Does not the application of that principle depend on the form of the words used in the indenture?] Not necessarily so. [LORD CHELMSFORD. — In *Stavers v. Curling*,⁴ Lord Chief Justice Tindal says, "The question whether covenants are to be held dependent [on], or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, to which intention, when once discovered, all technical forms of expression must give way."'] Even that test may be answered here in favour of the plaintiff, for the indenture nowhere shows that the whole business is to be stopped till the bonds are given; the fixing of a day for giving them is merely to prevent unnecessary delay in doing the work; but if part of the work had been done before the ten days elapsed, it would be contrary to the declared intention * of the parties to * 345 prevent the plaintiff from having payment for it, by telling

¹ 1 Wms. Saund. 320 c, n. 3.

² 3 Bing. N. C. 355, 3 Scott, 740.

³ 1 H. Bl. 273, n. See 1 Wms. Saund. 320 b, n. 3.

⁴ 3 Bing. N. C. 355, 368.

him that he ought previously to have gone through the formality of giving a bond.

In determining this question, regard must be had to the whole of the stipulations. The consideration here given by the plaintiff for the covenant of the defendant was, not the execution of a bond, but the doing of the work. That was the principle acted on in *Davidson v. Gwynne*.¹ In *Turrabochia v. Hickie*,² covenants that the vessel was tight, staunch, and strong, and should sail with convenient speed, were held not conditions precedent unless their breach frustrated the object of the voyage.³ *Kingdom v. Cox*,⁴ and *Clipsham v. Vertue*,⁵ *Campbell v. Jones*,⁶ and *Mattock v. Kinglake*,⁷ established the same rule, even where there were fixed days for the performance of certain acts, the observance of those days not being held a condition precedent, and *Dicker v. Jackson*,⁸ as to the delivery of an abstract of title in an agreement for the sale of lands proceeded on the same principle. The defendant here had dispensed with the plaintiff's performance of the contract, and thereupon the plaintiff was entitled to maintain his action, *Hochster v. De la Tour*,⁹ where after agreeing to pay a courier at and from a certain day, the defendant before the arrival of that day declined the plaintiff's services. So *Lovelock v. Franklyn*¹⁰ decided that the defendant having incapacitated himself from assigning a lease to the plaintiff by having assigned it to another person,

* 346 such act * of the defendant was a good ground of action, and that it was not necessary for the plaintiff to aver a previous tender of the money, or a request, or plaintiff's readiness to accept the assignment. In *Cort v. The Ambergate Railway Company*,¹¹ there was a contract for the manufacture and supply of goods from time to time to be paid for after delivery, where the defendant accepted and paid for a portion, and then gave a notice to the plaintiff not to make or send any more, as he, the defendant, would not accept or pay for them; the plaintiff was held entitled to maintain an action for breach of contract, without manufacturing or tendering the rest of the goods.

By the terms of the contract the giving of the bonds is not to

¹ 12 East, 380.

² 1 H. & N. 183.

³ But see *Behn v. Burness*, 3 Best & S. 751.

⁴ 2 C. B. 661.

⁵ 5 Q. B. 265.

⁶ 6 T. R. 570.

⁷ 10 A. & E. 50.

⁸ 6 C. B. 103.

⁹ 2 Ellis & B. 678.

¹⁰ 8 Q. B. 371.

¹¹ 17 Q. B. 127.

affect the rights and liabilities of the parties. [THE LORD CHANCELLOR. — Did the defendant mean by that reservation, that if he suffered a greater amount of damage than 5000*l.* he should not be barred from recovering for it? If so, he would be reserving equitable rights. If one person did so, would it be reasonable to deprive the other of that benefit?] It would not. If one made default, the other being ready to perform the covenant, the latter could have sued the defaulter; when both made default it had the effect of striking the covenant out of the indenture.

Two cases will be relied on by the other side. *Ellen v. Topp*¹ is the first; that was an action against a father for non-performance of the articles of his son's apprenticeship. The plaintiff had abandoned one of the three trades which he had engaged to teach the son, and that was held an answer to the action. But that case is distinguishable, for there the Lord Chief Baron in judgment * distinctly pointed out that the plaintiff himself had * 347 rendered it impossible for the defendant's son to do what was stipulated for in the articles of apprenticeship. The other case is *Graves v. Legg*.² There the agreement was to ship Donskoy wool within certain times, and there was a provision that the names of the vessels were to be declared as soon as the wools were shipped. It was held that the provision was a condition precedent; but that was because of the established custom of the particular trade, which rendered the wool saleable only on the declaration of the names of the vessels. These cases have no application to the present.

Mr. Mellish and *Mr. Horace Lloyd*, for the defendant in error. — This is a mere question of construction, and every thing depends on what was the intention of the parties. In the Court below it was thought that their object was to secure the performance of the contract by making the giving of the bonds a condition precedent. The other construction would frustrate that object. [THE LORD CHANCELLOR. — How is the payment of 1000*l.* within seven days consistent with the giving of the bond being a condition precedent, when that bond was not to be given till ten days?] No such thing as a payment of that kind was contemplated. It was known to be impossible to prepare and bring alongside a vessel within so short a period of time. The seven days meant seven

¹ 6 Exch. 424.² 9 Exch. 709.

days after the bond was given and the work begun. It was not intended, if the plaintiff did not perform the work, and should happen to become bankrupt, that the defendant should have * 348 to prove against the bankrupt's estate the * damages sustained by non-performance of the contract; and a mere action for non-performance of the condition as to giving the bond would be valueless, for the damages to be recovered therein would be merely nominal. It was therefore matter of necessity that the giving of the bonds should be a condition precedent; and such was the intention of the parties. Their object could not be secured but by making the giving of the bond a condition precedent.

"Forthwith" never had any other meaning in this contract but that of a reasonable time. But even if the vessel had been ready the next day, the plaintiff might have refused to bring it alongside till he got the defendant's bond, and the defendant might have refused to put the cable on board till he got the plaintiff's bond. [THE LORD CHANCELLOR. — Then if the parties had neither obligations nor rights till the bonds were given, does not that show that the two acts are of necessity mutual obligations?] Giving one bond may or not be a condition precedent to giving the other bond; but it is a condition precedent to the performance of the other stipulations of the agreement. It appears to be so on the face of the indenture itself. The averments in the pleadings do not show that the plaintiff was ready to give the bond, and that the defendant was not, but that both made default. Either party was at liberty to rescind the agreement. If both had gone on, the condition might have been waived; but that is not so with one alone. If one had duly performed the contract, he must, in an action upon it, have averred performance of all the conditions. Even under the Common Law Procedure Act that averment must be made. Here the averment was only that of readiness and willingness; no actual performance was shown, except by a general averment that the plaintiff had performed; nor * 349 * was there any averment that there had been any dispensation with the duty of performing this condition of the contract. The pleas, therefore, rightly traversed the general allegation of the declaration, and specially alleged that the condition of giving the bond had not been performed.

The true construction of the covenant is, that neither party

shall be called on to perform his part of the agreement until each has given his bond to perform it. It is for "the true performance of the covenants thereinbefore contained" that the bonds are to be given; and those covenants include the whole of the acts to be done under the contract.

Mr. Massy Dawson replied.

March 16.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, the question on this appeal is, whether having regard to the true construction and intent of the agreement of 15th May, 1855, the stipulation that the appellant should, within ten days after the date and execution of the agreement, give a bond with sureties for the due performance of the covenants on his part, was a condition, the previous fulfilment of which, unless waived or released, was necessary to enable the appellant to maintain any action upon the agreement.

The case has been learnedly argued at the bar, and many decisions were cited, but the question depends on simple principles. First, having regard to the subject matter of the agreement between the appellant and the respondent, the latter the representative of a company, it is reasonable to suppose that the company which was about to intrust the appellant with the laying down of a very valuable telegraphic cable, should require from the appellant security for the due fulfilment of his contract, * and the requisition that the bond should be given within * 350 ten days, is sufficient to show that it was intended to precede any material act under the agreement. The appellant indeed contends that if he had brought the "Cornwall frigate" or some other suitable vessel alongside Morden Wharf on the day of the date of the agreement, or the next day, the sum of 1000*l.* would have been payable to him by the respondent within a week afterwards; and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond, and that therefore the giving of the bond is not a condition precedent.

I cannot think that any such great expedition, if it had been possible, was contemplated by the parties, or that the appellant was bound to act with any such rapidity. His engagement is, that he will forthwith, at his own expense, procure the "Cornwall

frigate" or some other suitable ship or vessel for the purpose required; the word "forthwith" does not necessarily imply that this was to be done by the appellant before he had received the bond of the respondent and his sureties, that is, before the expiration of ten days. But if the appellant had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of 1000*l.*, and had received that sum (which must be the hypothesis) within the ten days and before the time for giving his bond expired, I should not have thought that it affected his liability to give the bond within the appointed time.

It is urged that in the state of things supposed, the 1000*l.* might not have been paid as stipulated, and so a breach of covenant by the respondent might have occurred within the ten * 351 days. If it did, I should still be * of opinion that the appellant was bound to give or tender his bond to the respondent within the prescribed time. The right to have the security of two responsible sureties for the performance of the appellant's covenant, was a very material thing to the respondent's company, and of the essence of the contract; and I do not think it could be effected by any thing voluntarily done by the appellant within the ten days.

It was also contended by the appellant, that the covenants to give the bonds by the appellant and respondent respectively were mutual covenants dependent one on the other; and that there was no default by the appellant until that instant of time at which there was a like default by the respondent, and that the respondent being in like default, could not defend himself by pleading the default of the appellant.

But I fear that this is not the true meaning and effect of the contract. The engagements to give the bonds are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties, is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement, that each party should find security within the time prescribed. If this be not done by either party both may be in effect released from the contract, which may fall to the ground; but neither party can recover for breach of the covenants in the agreement, unless he has performed this precedent obligation. I therefore move your Lordships that the judgment of the Court below be affirmed.

LORD CRANWORTH. — My Lords, I think that the judgment of the House ought to be for the defendant in error.

*I agree with the opinions of the learned Judges, that *352 the giving of the bond must have been intended to be a condition precedent to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless.

No doubt as there was a covenant by each party with the other, to give a bond with sureties within ten days, if default was made in giving a bond, a right of action would accrue for breach of that covenant, but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants it could only result in nominal damages. If brought after a breach no damages could be recovered, except such as would have been recoverable in an action founded on the breach itself. It would give no right against any sureties, the obtaining of which right was the sole object of the bond.

It was argued that the circumstance that the bonds were to be given not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested, might occur within the ten days, and so a right of action might accrue before any bond need have been given. This does not appear to me inconsistent with the hypothesis of a condition precedent. Probably the parties knew that, practically, no breach could occur within the ten days. But even if that is not so, the party injured by a breach of covenant within ten days might by giving his bond put himself in a condition to sue for the breach, for it would certainly be no answer on the part of the defendant sued for the breach, to say that he had not given his bond.

Suppose, for instance, that the plaintiff had on the day of the date of the indenture moored a proper ship alongside Mor-den Wharf, but that after the expiration of seven *days the *353 defendant refused to pay him the 1000*l*. The plaintiff, if he had given a proper bond with sureties to the defendant, would then have been in a condition to maintain an action of breach of covenant against the defendant, whether he had or had not given a proper bond to the plaintiff.

But it was argued that, even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions, and that the defendant, who had given

no bond to the plaintiff, could not insist on the want of such a bond from him. I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond, the party giving it puts himself in a condition of enforcing, if he thought fit, the performance of the covenants. If neither party, as was the case here, gave any bond, neither party could sue for any breach of covenant. This was the opinion of the Courts below, and in that view of the case I concur.

LORD CHELMSFORD. — My Lords, I agree with the decision of the Court of Exchequer Chamber affirming the judgment of the Court of Common Pleas.

The question is, whether the fourth plea is an answer to the action, or, in other words, whether the giving the bond by the plaintiff was a condition precedent to his right to recover damages from the defendant for his non-fulfilment of his part of the agreement.

The parts of the deed necessary to be noticed are these. [His Lordship stated them, see *ante*, 338.]

The learned counsel for the plaintiff argued that the covenant on the part of the plaintiff to give the bond * could not be intended to be a condition precedent, because he was forthwith bound to procure the ship or vessel, so that he was to do an act before the ten days had expired within which the bond was to be given; and also that the defendant, having covenanted to pay the plaintiff 1000*l.* on or before the expiration of seven days after the arrival of the ship or vessel at Morden Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent, according to the first rule upon the subject of dependent and independent covenants laid down in the notes to *Pordage v. Cole*.¹ They also contended that the case fell within the third rule stated in these notes, as it was a covenant going only to part of the consideration, the breach of which might be paid for in damages. These rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of

¹ 1 Wms. Saund. 320.

the intention of the parties. For, as Lord Kenyon said in *Porter v. Shephard*,¹ "conditions are to be construed to be either precedent or subsequent according to the fair intention of the parties, to be collected from the instrument; and technical words (if there be any to encounter such intention) should give way to that intention."

Now what may fairly be considered to have been the intention of the parties upon the whole scope and object of the deed in question? Putting the argument into a short form, it amounts to this: the defendant says to the plaintiff, In consideration of your doing certain acts, * and giving me a bond with *355 sureties to secure the performance of your covenant to do these acts, I will pay you a sum of 5000*l.*, and give you a bond with sureties to secure the payment. And the plaintiff, on the other hand, covenants to do the acts and to give the bond in consideration of the performance by the defendant of the covenants on his part to be performed.

Upon this short summary of the deed there could scarcely be a doubt that either party might refuse to perform his part of the agreement until he was secured by the bond of the other.

But the counsel for the plaintiff say that the particular terms of the deed show that this could not be the intention. In particular, they lay great stress on the word "forthwith" in the plaintiff's covenant to procure the vessel, which they interpreted to mean "immediately"; and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plaintiff must necessarily have been done before the expiration of the ten days, to the last moment of which the defendant was at liberty to delay the execution of the bond. And they also insisted upon the clause for payment by the defendant of 1000*l.* before the expiration of seven days after the arrival of the vessel at Morden Wharf, which might have happened within the ten days; and therefore they argued that the case, in both these respects, was within the first rule in the notes to *Portage v. Cole*.

It appears to me that too great force was attributed to the word "forthwith" in the agreement, and that all that was meant by it was, that the plaintiff was, without delay or loss of time, to procure a suitable vessel for receiving the telegraphic cable. And to quicken

¹ 6 T. R. 668.

his diligence the defendant covenanted to pay him 1000*l*.
 * 356 within seven * days after the arrival of the vessel at Morden Wharf. Out of regard to his own interest, too, the plaintiff would use all expedition in commencing the performance of the agreement, because unless he had the vessel with the cable on "board equipped and ready for sea by the 15th of July," he would have been liable to pay 200*l*. per week for his default. I think that the plaintiff could not have been compelled to take a single step, nor to incur the smallest expense towards procuring the vessel, till he was secured by having the defendant's bond, and that if he chose to proceed without having this security, everything he did was at his own peril. If the defendant wished to obtain a right to urge the plaintiff's progress within the ten days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the 5000*l*. became due.

It is a strong circumstance indicative of the intention of the parties, that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given "for the true performance of the covenants hereinbefore contained." They are obviously intended, therefore, to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though, strictly speaking, they enter into and form part of the consideration on both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties.
 * 357 ties. Nor is it easy to see how a breach * of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment.

I do not think that any thing in favour of the plaintiff can be made of the circumstance of the defendant not having given his bond. It appears to me that the mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other.

A supposed case was put at the bar, of the plaintiff, after the

ten days had expired without his bond having been given, going on to perform his covenants, and afterwards, in an action to recover the amount stipulated to be paid by the defendant, being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent as an answer to the action.

Looking at the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants before either was bound to proceed to perform any of the stipulations contained in the deed. For these reasons, I think the judgment of the Exchequer Chamber ought to be affirmed.

Judgment affirmed.

Lords' Journals, 16th March, 1865.

1864. April 22, 25, 26. 1865. March 14.

JOHN LLOYD VAUGHAN WATKINS, *Appellant*.

ARTHUR FREDERICK and Others, *Respondents*.

Will. Estate Tail and General. "Inherit." Trust and Trustees. Remoteness. "Equally and in Common."

A testator devised all his manors, &c. "to my son for his natural life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve" — (this devise in trust was repeated whenever necessary) — "for the son or sons, daughter or daughters, the males taking first, of my said son till they attain the age of twenty-one years, or the days of their marriage, and no further; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heiresses." He empowered his son to give "any part or even the whole of these estates" to any or either of his sons, but not to the daughters, "as my said son may, from their conduct to him, their father, think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200*l.* chargeable on his landed property, "and

to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates," &c. "I will therefore that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, &c., "the estates being equally divided between them or their heirs"; and he gave the "estates and property to them through the said trustees," &c. whom he empowered to raise 10,000*l.* for the daughters, chargeable on all his estate.

Held, that the son took only an estate for life; that the trustees took an estate in fee in remainder expectant on the determination of the life estate of the son, and that on the son's death without issue the estates went over to the daughters, as tenants in common in tail. No gift in the will was void for uncertainty or remoteness.

Quære. Whether an express devise to trustees in fee is cut down if the trust declared is not so extensive as the legal estate.

THE Reverend Thomas Watkins of Pennoyre, wrote his own will, in which he first referred to the property that he himself enjoyed under his father's will, in these words: "The estates bequeathed me by my much-loved and ever-honoured
* 359 * father, Pennoyre Watkins, Esq., are in settlement on my son Lloyd Vaughan Watkins,¹ let them devolve to him and his heirs, &c. My solemn request to my son and his issue is, that they never will, but by exchange, or by such sale as may consolidate and improve their landed property, alienate the same from my daughters and their heirs, should my son or his child or children have no issue." He then proceeded, "I hereby give and devise to my son all the manor or manors, estate or estates, houses, woods, livings, tithes, and other hereditaments, with their appurtenances, which I possess in fee or may hereafter possess, and (if I can) will add, all in entail or reversion at my death, for his natural life; and at his decease I hereby give and bequeath the same to George Price Watkins, Esq., Mr. Serjeant Taddy, and John Hensleigh Allen, Esq., their heirs and assigns, in trust to preserve the same for the son or sons, daughter or daughters (the males taking first), of my said son, till they attain the age of twenty-one years or the days of their marriage, and no further (the elder son to inherit before the younger), but the daughters to take equally

¹ The father's will gave them to Thomas "for his natural life," then to trustees to preserve the contingent remainders, hereinafter limited, "from being destroyed," besides those to Thomas and his sons; "and after his decease I devise, &c. to the first son of my said son Thomas and the heirs of his body."

and in common as joint heiresses. I also hereby empower my said son to give by deed or will, any part or even the whole of these estates and property to either or any of his sons, but not to his daughters, as my said son may, from his or their conduct towards him, their father, think deserving of preference. However, if the eldest of such sons should turn out ill, and his conduct be disapproved of by his father, Lloyd Vaughan Watkins, I still leave *even to him an annuity for life of 200*l.*, chargeable *360 on my landed property, to be paid quarterly; and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates, and hereditaments; provided that his father (my son's son) give him up to my said son, Lloyd Vaughan Watkins, for his maintenance and education, but not otherwise. I will therefore that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my said son may make. Upon this principle I wish my son to dispose of the estates which he may have in fee to his children. (See my father's will.) Should my son die without issue, I will and direct that the said trustees, their heirs and assigns, preserve the said estates and property, and all which I now possess or may hereafter have, for my four daughters" for their respective lives, free from the control of husbands, "the said estates and property being equally divided between them or their heirs." He declared that he gave such estates and property to them "through the said trustees, and under the same entail, limitations, power of preferring, &c., among their respective children as before given to my son"; and in like manner he gave the trustees power to raise for the daughters a sum of 10,000*l.*, which he charged on all his estates.

The testator died in October, 1829, leaving the appellant his only son and heir at law. The appellant entered into possession of both sets of estates. He is a widower, and he never had any children.

In August, 1854, the appellant, claiming to be entitled as tenant in tail in the estates devised by the testator, executed a disentailing deed, which was duly enrolled in Chancery, limiting the estates to himself, his heir, appointees, and assigns. Having mortgaged the estates for *large sums of money, the appellant *361 became desirous to sell a part in order to pay off the mortgages, but a difficulty arising about the title under the will of the

testator, a bill was filed in the Court of Chancery by the appellant against his sisters and their representatives, praying that it might be declared that, according to the true construction of the will of the testator, the appellant became entitled to an estate tail in the devised property, and that such entail had been well and sufficiently barred by the deed of 1854. Answers having been put in, the cause was heard before the Master of the Rolls, who, on the 5th of December, 1862, made a decree, declaring that the appellant took only an estate for life in the premises. The appellant carried the case before the Lords Justices, who differed in opinion. Lord Justice Turner concurring with the Master of the Rolls, his judgment was affirmed. The present appeal was then brought.

The Attorney-General (Sir R. Palmer) and Mr. Selwyn (Mr. Harris Prendergast was with them), for the appellant. — The whole will taken together shows that the appellant was the favorite object of the testator's bounty, and that an estate tail was intended to be given to him. The testator's whole idea was that of descent and inheritance, as his use of the words "entail," "inherit," and "heiresses," abundantly proves. Children can only "inherit" because their parent has possessed an estate of inheritance not of purchase. A mere particular expression in one part of the will cannot be allowed to contravene the general intent. Even if there was such a particular intent expressed, which can hardly be said to be the case here, the question whether that or the general intent was to prevail must be decided by the whole context of

* 362 * the will, *Jenkins v. Hughes*.¹ Here the whole context shows a marked and decided preference for the son of the testator, and powers are given him which never could be supposed to be intrusted to a mere tenant for life. The testator plainly intended a descent of his estates in the male line of his family, on the principle of estates in tail male, but to this son he gives the power of removing any one of his grandsons from the succession, and preferring another; and even the son of the undeserving grandson is not to succeed to the estate unless this grandson's eldest son is given up to the testator's great favourite, his own son, for education.

It is no sufficient argument against such a construction of the

¹ 8 H. L. Cas. 571.

will, that if an estate tail should be given to the testator's son, he may defeat some of the other provisions of the will, *Atkinson v. Holby*,¹ *The Earl of Tyrone v. The Marquis of Waterford*.² The words of the will must be followed, and here the words "should my son die without issue" have the effect, in combination with the other provisions in the will, of giving him, by implication, an estate tail. In *Roddy v. Fitzgerald*,³ the words were "to my son W. during his life, and after his death to his lawful issue, in such manner as he, by deed or will, shall appoint," and they were held to give, by implication, an estate tail; and in *Jenkins v. Hughes*, the words "eldest son of my nephew T., is to be considered as heir to my estates," were held sufficient to show that the nephew was intended to be tenant in tail. The observations of Lord Justice Turner, in *Pride v. Fooks*,⁴ do not in reality differ from these authorities.

* The gift to the trustees is not a gift to them in fee. *363 They took a chattel interest only. They have the estate only for a particular purpose, namely, to preserve the remainder for the daughters till twenty-one or marriage "and no further." These words show that there was no such indefinite object in creating the trust as to require, for the purpose of its execution, the legal fee to be vested in the trustees.

The gift of the estate, in the case of the exercise of the son's power over an undeserving grandson, being a gift by the testator himself to the eldest son of that grandson, is too remote and cannot be supported. And the devise following the gift to the appellant for life, and the ultimate gift to the testator's own daughters, are either void for uncertainty or are too remote.

Mr. Hobhouse and *Mr. Eddis*, for the respondents. — To give the appellant an estate tail would enable him to defeat all the limitations, and that would be contrary to the plain intention of the testator, who desired to keep all the estate in the line of his own family. All the arguments which are used to show that he thought of entailing and inheriting justify this view of his intention. He did not mean that it should be defeated by the first taker of the estate.

¹ 10 H. L. Cas. 313.

² 1 De G., F. & J. 613. See also *Byng v. Byng*, 10 H. L. Cas. 171.

³ 6 H. L. Cas. 823.

⁴ 3 De G. & J. 252, 273.

To him, therefore, the gift was expressly in words limited to a life estate.

The trustees took an estate in fee. There are good technical words to give them such an estate, and it is necessary that they should possess it in order to effectuate the purposes of the will. The life estate to the son is first given, then comes the gift to the trustees to preserve. What are they to preserve? First, the estates tail to the sons of the testator's son, subject only to the power reserved to punish an undeserving son by making him an

* 364 exception to the general rule of the will; and * then, in case of the testator's son dying without issue, to preserve the estate to the daughters in tail general, who are expressly to take "through" the trustees. The object of the trust establishes the nature of the estate which the trustees must enjoy in order to effectuate it. *Doe d. Davies v. Davies*¹ is the great authority on the subject. Mr. Justice Patteson there clearly explains the principle, which explanation is adopted in Mr. V. Hawkins's excellent treatise on Wills;² and *Blagrove v. Blagrove*³ really proceeded on that principle, as Lord Campbell suggested when, in *Pond v. Watson*,⁴ he quoted with full approval the principle as stated by Mr. Justice Patteson. The words "and no further" do not cut down the estate of the trustees, but simply mark the point at which their services as trustees will cease to be necessary; but they get the whole fee for the purposes of the trusts which they are to perform.

The subsequent words here will not create an estate tail in the son, for all the issue are provided for — estates of inheritance are given to all. Then the words "dying without issue" mean the failure of the issue of those who are mentioned in the prior gift. The sons succeed in tail, with remainders to the daughters, and the remainder over is vested, not contingent, the words "first and other" showing succession. The will is not void for uncertainty or remoteness. The legal estate in the trustees will support all the remainders, and there is no event which must not happen during the life of the testator's son.

The Attorney-General replied.

Mr. Homersham Cox appeared for the trustees, but was not heard.

¹ 1 Q. B. 430. ² Page 150. ³ 4 Exch. 550. ⁴ 6 Ellis & B. 606, 616.

* THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, * 365 three points were made by the appellant's counsel in their argument, namely, First, that the limitations to the sons and daughters of the appellant, who had no issue at the date of the will, or of the testator's death, are contingent remainders, and not supported by any estate of freehold in the trustees to preserve, who it is contended took a chattel interest only. Second, that the devises between the gift to the appellant for life and the ultimate gift to the testator's four daughters, are either void for uncertainty, or are, as to part, too remote. Third, that the words "should my son die without issue," which are introductory to the gift over to the testator's daughters, give, by implication, a remainder in tail general to the appellant, which, uniting with his life estate, made him tenant in tail in possession.

The first question is, What estate was taken by the trustees? and my opinion is, that they took the legal estate in fee in remainder expectant on the determination of the life estate of the appellant.

The argument of the appellant is, that the clearly expressed devise to the trustees, their heirs and assigns, is cut down to a chattel interest by the words that follow, viz. "in trust to preserve the same for the son or sons, daughter or daughters (the males taking first), of my said son, till they attain the age of twenty-one years, or the days of their marriage, and no further." But although these words declare a limited trust or purpose, they may be taken to denote the period during which the trustees, when their estate took effect, were to have the management and receipt of the rents of the estates devised, and they do not render unnecessary the larger estate in fee expressly given to the trustees; for that would be still required to preserve the contingent remainders, * which would not be supported by a term of * 366 years, and also, as I think, to enable the trustees to raise the sum of 10,000*l.* I do not assent to the proposition that a clear express devise to trustees in fee must be cut down if the trust declared is not so extensive as the legal estate. But further, it is clear from the subsequent gifts to the four daughters of the testator and their issue, for whom "the said trustees, their heirs and assigns," are directed to preserve the estates and property, and to whom the estates are given "through the said trustees," that the trustees must, to answer the purposes of the will, take an estate in

fee. I am therefore of opinion that the trustees took the legal estate in fee simple in remainder on the life estate of the appellant.

With respect to the second question, I think the language of the testator, though in many parts inaccurate and confused, is yet capable of a reasonable and consistent interpretation, and that no part is void for uncertainty ; nor does any gift appear to me to be too remote. It was not disputed that the first limitation is to the first and other sons of the appellant in tail general. The legal fee, being in the trustees, these and all other estates are equitable only.

That the grandsons take estates tail follows of necessity from the direction that they shall take in succession one after the other, "the elder son to inherit before the younger." And here I would advert to the argument on the words "to inherit," which I think are used by the testator as equivalent simply to the verb "to take." But if more is required, then certainly the words "to inherit" are fully satisfied by holding them to mean "to take an estate of inheritance," which estate must be an estate tail, in order that the clear direction that they shall take in succession may be effectuated.

* 367 * And in connection with this, I would refer to the power given to the appellant to alter the order of succession of his sons, so as to put the second before the first, or the third before the second, in the order of enjoyment, subject to the restriction that if the eldest son be postponed or excluded, it shall not affect the right of the eldest son of such eldest son (who is substituted for his father), provided such grandson of the appellant be given up to the appellant to be educated ; all which directions, as they must, if at all, happen during the life of the appellant, may not be void by remoteness, although they are very obscure and difficult of construction.

But it is not necessary on the present appeal to determine any thing as to the validity, or, if valid, the extent of this power : they are, I repeat, very obscure and difficult questions. It is only necessary to ascertain that there is nothing in the language creating the power, or in the power itself, that interferes with the construction given to the devise in favour of the sons and daughters of the appellant.

I return to the devise to the appellant's daughters, who, it is de-

clared, shall "take equally and in common as joint heiresses." It is true that there is not the same reason for holding that the daughters take estates tail as in the case of the sons. But it is not reasonable to suppose that they were intended to take otherwise than in tail; and the word "joint heiresses," in connection with the words "equally and in common," would be satisfied if they take as tenants in common in tail general. I think this is a necessary consequence from the form of the gift over, and of the words "should my son die without issue"; which import a general failure of issue, and can receive effect only by holding that the sons take * successively estates in tail general, with re- * 368 mainder to the daughters as tenants in common in tail general, with cross remainders between the daughters.

There are several *indicia* of intention in the subsequent parts of the will which confirm this construction. Thus the testator says, "Upon this principle, I wish my son to dispose of the estates which he may have in fee to his children. (See my father's will.)" And on referring to the father's will, it appears that considerable estates were given to the testator Thomas for life, with remainder to his first and other sons in tail general, with remainder to all and every the daughters of the testator Thomas, as tenants in common in tail general. And I interpret the words I have cited as a direction by the testator to take his father's will as an illustration of the principle of his own.

Some further confirmation of the conclusion, that the appellant's daughters take as tenants in common in tail is also afforded by the words that follow the gift to the testator's own four daughters, namely, "I give such estates and property to them through the said trustees, their executors and assigns, under the same entail, limitation, power of preferring and dividing to and between their respective children as before given to my son." I cannot therefore concur with the Court below in holding that the daughters of the appellant would take as tenants in common in fee. If so, the gift over to the testator's own daughters would be too remote, unless from the words "should my son die without issue" an implication is raised of a remainder in tail to the appellant, to take effect as an alternative remainder expectant on the determination of the estates tail, to the first and other sons, in case there should be no daughter of the appellant; a construction that would defeat the gift to * the testator's own daughters if the appel- * 369

lant had no other child than a daughter that lived but a few minutes only.

The result is, that the limitations are consistent, and (with the exception of the power given to the appellant which does not affect the construction of the devises) the scheme of the will is intelligible and natural. The appellant takes for life, with remainder to the trustees in fee simple, upon trust for the first and other sons of the appellant in tail general, and in failure thereof upon trust for the appellant's daughters as tenants in common in tail, with cross remainders between them, and with remainder upon trust for the testator's four daughters in like manner. The conclusion is, that the appellant takes an estate for life only, and that the appeal must be dismissed.

LORD WENSLEYDALE. — My Lords, this question arises upon the will of a gentleman, prepared by himself. It is clear that he had become acquainted with many legal terms, but was unacquainted with their meaning; and in many parts of the will there is considerable obscurity, and there is much difficulty in assigning the construction which the words ought to bear. But after carefully considering the able judgments of the Master of the Rolls, and of Lord Justice Turner who has most carefully and elaborately examined every part of the will, whatever doubt I may feel upon some parts of the case, I cannot say I feel much upon the principal question, whether the testator has given any thing more than an estate for life to his son, the appellant.

The testator gives to the appellant all his estates, &c. expressly "for his natural life," then, at his decease [his Lordship read the will, see *ante*, p. 359].

It was insisted on behalf of the appellant, both in the Court * 370 below and in this House, first, and principally, * that the appellant, under the will, took an estate tail by virtue of the provision "should he die without issue," raising the inference that if he had issue they should be entitled to it, and therefore that he had an estate tail; if so, as he had executed a disentailing deed, he was entitled in fee. But the will contains previously to these words, particular provisions for all the appellant's sons and daughters, and indicates a great desire to provide for his own daughters.

I agree entirely with the Master of the Rolls, that the true con-

struction of this clause is, that it is to be read as if it contained the words "such issue," and is merely referential, and gives no additional estate by reference. It seems to me, I own, to be the natural construction, and the books are full of cases in which such construction is given to similar provisions, and where the word "such" has been introduced by implication into a similar clause. Many of those cases are collected in Jarman.¹

I feel satisfied, then, that the opinion of the Master of the Rolls and of Lord Justice Turner, that the appellant took only an estate for life, and that he did not take an estate tail in consequence of the subsequent words "in case he should die without issue," is correct.

But it was contended also, that the appellant, if not entitled as devisee, was entitled as heir, because all the limitations over after the estate for life expressly given to him were so confused and inexplicable as to be void for uncertainty.

I entirely agree, on this part of the question before us, with the observation of Lord Justice Turner, that whatever other difficulties there may be in some parts of the will, it is quite clear that the testator intended the estate to pass *after the * 371 death of his son to his issue, and they failing, to his own daughters and their issue; and this part of the will cannot be avoided for uncertainty.

I may add also, that I quite agree with the view of Lord Justice Turner upon all the other parts of the case, which he has most carefully and accurately investigated.

LORD CHELMSFORD,— My Lords, I agree with my two noble and learned friends, that the decree appealed from ought to be affirmed. The whole difficulty in the construction of the will has arisen from the testator's desire to express himself in technical language, with the exact meaning and effect of which he seems to have been but imperfectly acquainted.

This question turns upon the effect to be given to the words "should my son die without issue," which introduce the devise to the daughters of the testator. Looking to the whole scheme of the will, I cannot think that the testator had any idea of giving to his son Lloyd Vaughan Watkins more than an estate for life. If, therefore, an estate in tail were to be raised in him by implica

¹ 2 Jarman on Wills, ch. 40, p. 409.

tion, it would, in my opinion, be a surprise upon the testator's intention.

The will, in the first place, gives to the son an express estate for life. The testator then intending that his estates should go to the unborn children of his son (who had no issue), and having probably gathered from his father's will (which he more than once refers to in the course of his own) the necessity of protecting these contingent interests, gives the estates, at the decease of his son, to trustees, their heirs and assigns, in-trust, "to preserve" —

[His Lordship read the words]. Under this gift to the * 372 trustees, they must have been intended to take * more than a chattel interest; for they are not merely to have the estates until a son of his son attained twenty-one, or a daughter of his son attained twenty-one or married; but they are to preserve them for all the persons successively interested, and expressly for the daughters of the testator, to whom the ultimate limitation is made, and who seem to have been always regarded by him as the proper persons to succeed to the estates both of himself and of his father, in the event of his son leaving no issue. The words in the gift to the trustees, "till twenty-one or day of marriage, and no further," could not therefore have been intended to qualify the previous devise to the trustees "their heirs and assigns;" but all that can be meant by those words (if any definite meaning can be given to them) is, that the trustees are to keep the estates for the persons beneficially interested, if sons till twenty-one, and if daughters till twenty-one or marriage.

The next question to be considered is, what estates did the sons and daughters of the testator's son take under the limitation to them? In my opinion, that limitation must be construed to give to the first and other sons of the testator's son an estate in tail general, with remainder to the daughters as tenants in common in tail general.

Much difficulty has been created in the construction of the will by the power conferred upon the testator's son to prefer a particular child of his own, and to exclude another, and by the gift, by the testator himself, of the estate to the eldest son of such undeserving son.

The powers thus given to the testator's son seem to be twofold: first, to enable him at his pleasure to alter the order of succession of the sons; and secondly, without changing the order of the suc-

cession of the sons, to set aside a son of whose conduct he disapproved, in favour of * a grandson. I do not think * 373 that the power to disturb the order of succession amongst the sons extended to enable the testator's son to give an estate in fee to any of his sons, although the words are very large — "any part or even the whole of the estates and property."

But these words must be applied to the quantity, and not to the quality, of the estates. I infer this from the idea of an entail, which appears to pervade the whole scheme of the testator's dispositions; from the words in which a similar power of preference is given to the daughters, which are, "I give such estates and property to them under the same entail, limitation, power of preferring and dividing to and between their respective children, as before given to my son"; and from the devise to the daughters, if his son should die without issue, which almost necessarily connects itself, as explanatory of his intention, with a prior clause in his will relating to his father's estates, which he requests his son and his issue never to alienate from his daughters and their heirs, "should his son or his child or children have no issue."

The other power, of setting aside an undeserving son and giving the estate to the grandson, appears to amount to this: if my son disapproves of the conduct of any son standing first in the order of succession, instead of passing by his whole line and preferring another son and his issue, he may entail the estate upon the son of the undeserving son. By the words, "and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates, and hereditaments," I do not understand the testator to mean that upon the mere expression of disapproval by the testator's son of the conduct of his son, the will is immediately to operate in favour of the grandson; but that in the event supposed, the testator's son is empowered to pass the estates to the * grandson without further interrupting the order of suc- * 374 cession, yet still preserving his power of preferring one son to another. This appears to me to be clear, from these words of the testator: "I will therefore that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my said son may make."

Therefore the whole scheme of the limitations prior to the words "should my son die without issue," upon which the question as to the implication of an estate tail to the testator's son depends, ap-

pears to be as follows : To the testator's son for life ; remainder to trustees in fee in trust for the first and other sons of the son in tail general ; remainder to the daughters of the son as tenants in common in tail general, with the ultimate remainder to the daughters of the testator, with a power to the testator's son to prefer any of his sons, in the order of succession to the entail, or, without disturbing the order amongst the sons, to set aside an underserving son, and appoint a grandson to succeed to the entail to the exclusion of his father.

If this is a correct view of the limitations (and this is the way in which I understand them), there is no room left for any implication of an estate tail on the testator's son, because all his children and their issue who could by any possibility be included in an estate tail, if implied, are already provided for. There is nothing to be disposed of, between the limitations to the children of the testator's son and their issue and the gift over to the testator's daughters, which requires the implication of an estate to fill up a chasm in the dispositions. Therefore the words "should my son die without issue" can only mean "in the event of the termination of the prior limitations," which excludes the possibility of the implication contended for by the appellant. This is the

* 375 conclusion * at which I have arrived after much consideration of a will of rather difficult construction ; and I am therefore of opinion that the decree appealed from ought to be affirmed.

Decree and order affirmed, and appeal dismissed with costs.

Lords' Journals, 14th March, 1865.

WEST v. LAWDAY.

1865. March 14, 16.

JAMES WEST, *Appellant*.SUSANNAH LAWDAY, *Respondent*.*Will. General Description. Falsa Demonstratio.*

Where some subject matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety, expressly and definitely given, shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overruled by an apparently general devise.

A person was possessed under one and the same lease for lives renewable for ever, of lands denominated B., C., F., and G., all situated in the county of Kerry. He granted out the lands of G. for lives with a covenant for perpetual renewal, reserving thereout a perpetual fee-farm rent. Some years after this grant he made his will, which recited that he was possessed of a lease for lives, renewable for ever, of certain lands in the county of Kerry, "which said lands are denominated B., C., and F., all situated in the parish of, &c. in the county of Kerry." He directed that "the aforesaid lands" should be sold, and after payment of his debts be equally divided between J. W. and S. L. After giving several legacies, he made J. W. "residuary legatee of all my real and personal estate and effects":—

Held, reversing the decision of the Master of the Rolls and the Lords Justices of Appeal in Ireland, that the estate of G. did not pass under the general devise, but went to the residuary legatee.

THE testator, Saint John Mason, for many years a resident of Bath, possessed, at the time of making his will, *lands called West Clyney, and Farranaspig, and Bally- * 376 downey, situate in the barony of Magonetry, and parish of Abadoo, in the county of Kerry, in Ireland, which he held under a lease for lives renewable for ever. He was also possessed of an annual perpetual fee-farm rent or head-rent issuing out of other lands in Kerry called Groyne.

All these lands had originally come into his possession under a lease for three lives, granted in October, 1764, by Robert Emmett, M. D., to John Mason, his heirs, &c. "of the towns and lands of Ballydowney with its sub-denominations, and Farranaspig, and Groyne, with the three gneeves of West Clyney, situate," &c. in

Kerry, at a rent of 78*l.* 2*s.* This lease contained a covenant for perpetual renewal on payment of a fine of 6*d.* on each life. In 1840 the testator granted a lease for lives of Groyne to one Gorham, at a rent of 70*l.* per annum. This lease contained express powers of distress and re-entry; and also contained a covenant for perpetual renewal on payment of all rent in arrear, and 1*s.* fine on each life.

On the 16th March, 1858, the testator made his will, in which there was this devise: "Being possessed of a lease, for lives, renewable for ever, of certain lands in the county of Kerry, in Ireland, which said lands are denominated Ballydowney, Clyney, and Farranaspig, all situate in the parish of Ahadoe, in the said county of Kerry, &c. . . . I do therefore require that the aforesaid lands should, as soon after my decease as possible, be sold; and, after payment of my just debts, be equally divided between the said J. West and Susannah Lawday, as tenants in common, and not as joint tenants." He then specified his debts, gave certain legacies, and concluded thus: "And I appoint the said J. West residuary legatee of all my real and personal estate and effects."

The testator died a few days afterwards. The other lands * 377 were sold * and the debts paid, but disputes arose as to Groyne. The appellant, on the 24th July, 1861, filed his cause petition in the Court of Chancery, in Ireland, in which he set forth the will, and prayed for a declaration of the Court that he was entitled to Groyne under the residuary bequest. An answer was put in, and proceedings were thereon had before Master Brooke, who, on the 6th June, 1863, reported that the petitioner West was entitled to Groyne. The case was taken to the Master of the Rolls, on appeal; and on 17th April, 1863, his Honour declared that Groyne passed under the specific devise; and reversing the Master's order, he made a decree accordingly.¹ On appeal to the Lords Justices, they, on the 16th June, 1863, affirmed the decree of the Master of the Rolls.² The present appeal was then brought.

Mr. H. W. Cole and *Mr. Archibald Roberts*, for the appellant. — The fee-farm rent of Groyne could not pass under the word "lands," and the judgment for the respondent cannot be sustained unless the words which specifically name the lands devised are

¹ 14 Irish Ch. N. S. 209.

² 14 Irish Ch. N. S. 340.

struck out of the will. That cannot be done in fact, and must not be done by implication: the very words of the will must be followed, as giving the best indication of the wishes of the testator; *Grey v. Pearson*.¹ Groyne, though originally conveyed to the testator under the same deed with the rest, was not part of "the lands denominated Ballydowney, Clyney, and Farranaspig." The testator himself had treated it differently from the rest, and his will must be considered as having purposely applied different language to the two sorts of property. He had merely retained a head-rent out of * Groyne, having parted with the estate * 378 on a lease for lives, with a covenant for perpetual renewal at a nominal fine, and that rent would not have gone to the same person as the lands; *Jenison v. Lexington*.² The fee of the land was not in the testator, but in Gorham. There is no latent ambiguity in this will, so as to give rise for any necessity for considering the applicability of the doctrine of *falsa demonstratio* in Bacon's Maxims,³ as in *Doe v. Lyford*,⁴ and *Morrell v. Fisher*;⁵ though in each of these cases it is observable that the description given in the will was strictly applied, and was not by implication extended to any thing else. So it was again in *Webber v. Stanley*.⁶ Here "the aforesaid lands" could only mean those previously mentioned, and the testator had mentioned none but these three denominations, which he had not described in vague and general terms, but had specified by name. The description being sufficient, *Roe d. Conolly v. Vernon*⁷ applies, that where the grant of a particular thing is once sufficiently ascertained, the addition of matter mistaken or false will not frustrate it. *Doe v. Bell*⁸ is to the same effect, and wherever subsequent words have been suffered to affect a previous devise, it has been where that devise was in itself insufficient from vagueness, and left something in doubt; that is not the case here.

Mr. Greene and *Mr. R. W. Osborne* (of the Irish bar), for the respondent. — In this case evidence of the condition of things at the death of the testator was admissible, to explain what * were his real intentions, and that evidence would show * 379 either that Groyne was a sub-denomination of Ballydowney

¹ 6 H. L. Cas. 61.⁴ 4 M. & S. 550.⁷ 5 East, 51.² 1 P. Wms. 555.⁵ 4 Exch. 591.⁸ 8 T. R. 579.³ Reg. xiii.⁶ 16 C. B. N. S. 698.

or was so considered by the testator, and therefore passed under the general devise in his will; *Doe d. Beach v. Jersey*.¹ There is not here a complete, perfect, and unequivocal description of the whole property held by the testator under the lease renewable for ever; he only describes part of it. It being admitted that Groyne is held under that very lease, just as much as are the other three denominations, there is not in the will any apportionment of the head-rent away from the rest, nor is there any separation of Groyne from the other property. The will clearly points to the whole of the property held by the testator under the lease as subject to his debts, and there is not any exception of Groyne from that liability. Groyne therefore was equally affected with the rest, many of these debts being incurred subsequent to the grant of the fee-farm lease to Gorham. Finally, the will itself shows an equal motive to favour the appellant and the respondent. So far, therefore, there is no reason for saying that Groyne was not intended to pass.

As to the first point, *Slingsby v. Grainger*² was referred to in the Court below; but there one description of the property contradicted the other: here the description of the property as held under a certain lease is complete, and there was no word of description such as existed there, to raise a doubt whether the whole was included. The will is not some of my lands, but all my lands, in the lease. [LORD WENSLEYDALE. — But the lands are not merely referred to, but named. Can any other pass but those

* 380 which are so named? THE LORD CHANCELLOR. — * Suppose I had one lease of six houses, three in Grosvenor Square and three in Belgrave Square, and I devised “all my houses in such lease,” and then named the three houses in Berkeley Square, would all the six pass?] Under certain circumstances they would. Here there is a clear statement of the subject matter of the devise in two lines of the will, and that cannot be rendered obscure or doubtful by any unmeaning words which follow. *Roe v. Vernon*³ is an authority for the respondent; it shows that a mistaken or false allegation will not affect a previously plain description. Here the description was plain — all the lands that the testator held under lease in Kerry — all which, too, he made subject to his debts. The two branches of the sentence must be read together. In the *Vicars Choral of Litchfield v. Ayres*,⁴ there was a

¹ 1 B. & Ald. 550, 3 B. & C. 870.

² 5 East, 51.

³ 7 H. L. Cas. 273.

⁴ W. Jones, 485.

devise of all the appropriate tithes in a certain parish, lately in the occupation of one Margaret Peto. All the tithes belonging to the rectory of that parish passed, though only part of them had been in her occupation. Can the words relied on by the other side be treated as forming part of the original description of the gift; or are they mere superadded words, without meaning and effect? Even in matters of purchase and sale, the chief description would be adhered to, though a mistake might be committed in another part of the conveyance; *Llewellyn v. Jersey*.¹ [LORD WENSLEYDALE. — That was a clear case of *falsa demonstratio*.] In *Harrison v. Hyde*,² there was no mention of an old enclosure, but it was held part of the estate devised, because there was a general description which would include it. So here Groyne, though not actually mentioned, plainly comes within the general * description of the lands held by lease on perpetual renewal * 381 in Kerry. To exclude it is to make a severance of one part of the estate from the rest: *Stanley v. Stanley* ³ is in point; *Webber v. Stanley* ⁴ was on another will, and is not in point, for there the words did actually limit the description to the county of Hants, and there was no ground given by any expression in the will to show that all the lands were included. But in *Marshall v. Hopkins*,⁵ the devise being of lands in a parish, though followed by "now in the occupation of," these words were rejected as restricting the general devise, and lands not in such occupation were held to pass.

The testator here had a devisable estate in Groyne. He was entitled to rent as in an ordinary tenancy from year to year; he had reserved a right of re-entering and repossession on nonpayment of rent, and Gorham's interest was, therefore, merely a tenant's interest under the testator.

Mr. Cole replied.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this case undoubtedly, bringing as it does before your Lordships the concurrent opinion of two Courts of Justice below, namely, first of the Master of the Rolls, and then of the Court of Appeal, deserves your Lordships' careful consideration; but the elaborate

¹ 11 M. & W. 183.

² 2 Johns. & H. 491.

³ 15 East, 309.

⁴ 4 H. & N. 805.

⁵ 16 C. B. N. S. 698.

arguments which he have heard, and the time which has been occupied, and properly occupied, by counsel, extending as it has done during part of two days, has given your Lordships the opportunity of becoming thoroughly conversant with the case, and of communicating with each other upon the subject. I think, therefore, that we are * in a condition to come to the determination of the matter in a satisfactory manner at once. I must confess that I cannot for myself feel any great difficulty upon the subject.

I desire first of all to observe with care what are the words of the gift. The words of the gift, which follows an introductory preface or statement made by the testator are — [His Lordship read them].

It is material to remark that the words are not “the aforesaid leasehold,” or “the aforesaid leasehold lands,” but they are “the aforesaid lands”; a phrase which cannot be distinguished from the phrase “the lands hereinbefore mentioned,” or “the lands hereinbefore described.” The form, therefore, of the expression throws us back on the antecedent part of the will, to gather from that what are the lands which had been mentioned or described.

The testator tells us, in the first place, that “being possessed of a lease for lives renewable for ever of certain lands in the county of Kerry, &c.” Those words certainly are not descriptive of any lands. He says “certain lands,” that is, some lands in the county of Kerry, “which said lands are denominated.” Now, my Lords, I cannot understand where can be the difficulty. “Which said lands are” — what lands? Why, they are “certain lands” — which words are merely words of reference to a thing unknown and not described; but the generality and the want of precision in that form of expression are supplied by the words that follow, and which plainly mean to substitute a definite and precise statement for an antecedent generality. Accordingly, therefore, in a manner perfectly in conformity with the idioms of the English language, he goes on to specify what are the “certain lands” to which he has referred; and, using the relative which refers to the “certain lands,” he tells you the “said lands” are “denominated”; and he gives certain * names, being the denominations of the lands intended to be devised; and by reference to which names we satisfy the expression “aforesaid,”

contained in the description subsequent to the devise, namely, "the aforesaid lands."

It would have seemed to me to require no ordinary ingenuity to find a difficulty or an obscurity in such a simple form of expression; for unquestionably, if I had been asked what are the "certain lands in Kerry," I should have said, "The testator answers for himself; — 'the lands which are denominated Ballydowney, Clyney, and Farranaspig.'" Then he goes on to tell you where they are situate, namely, in the parish of Ahadoe. These words, therefore, are the unfolding, the explanation, of the general expression, "certain lands in the county of Kerry."

That being the state of the case, and that being the plain and obvious meaning of the words, it is by the ingenuity of counsel that we have been involved in this kind of difficulty; that these words, "which said lands are denominated" so and so, are altogether erroneous, and that the testator used them under a mistake. And accordingly they desire your Lordships to regard these words as coming under the ordinary maxim of *falsa demonstratio* (that being the sort of technical reference to the rule that is referred to), and they desire your Lordships to accept the words as an imperfect enumeration of the lands that were intended to be described. It would be impossible to do so without violating a cardinal principle of language, and saying that when words, according to their ordinary and grammatical and obvious and natural sense and meaning, have a clear and unambiguous interpretation, that meaning ought to be done away with in order to substitute for it another meaning.

* It is altogether a mistake to suppose that the language * 384 of this will is capable of being brought within the range of that maxim. That maxim to which I refer is applicable to a case where some subject matter is devised as a whole under a denomination which is applicable to the entire land, and then the words of description that include and denote the entire subject matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent, universal, or generic denomination. Then the ordinary principle and rule of law, which is perfectly consistent with common sense and reason, is this: that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and

inaccurate enumeration of the particulars of the specific gift. And, therefore, to bring the case at the bar in all its bearings at all within the rule which has been applied in the cases to which I have referred, your Lordships ought to have had something like these expressions, "being possessed of certain leasehold lands," or, "being possessed of a lease in the county of Kerry, consisting of" so and so, "I devise the said lease." And if there had been a devise of the lease as an entirety, it is possible that the generality of that description might not have been derogated from by an imperfect enumeration of the particulars included in the lease, and falling under that generality. But there is nothing of the kind here; for, as I have already observed, with a view to anticipate the argument, the words of the gift cover and include only such lands as are antecedently mentioned, and no lands are antecedently mentioned or described except those of Ballydowney, Clyney, and Farranaspig.

Some aid was attempted to be derived in argument by * 385 * the counsel, from the fact that the testator referred to the debts, and the argument attempted to be put forward was, that there were debts that affected these particular lands, and affected also another estate called Groyne; and it is attempted to be said that inasmuch as he alluded to debts only "affecting the said lands," he meant by "the said lands," all the lands subject to these debts; and that therefore all the lands must be taken to be devised. But, my Lords, it would be impossible to accept that as a rule of interpretation, seeing that the things described and the things given are affected by the debts. Therefore, the words, "debts affecting the said lands," are truly answered by finding, that these three lands are charged with the debts.

My Lords, an attempt was made, and I think upon very insufficient grounds, to contend that the words "Ballydowney lands" in this enumeration of lands, were used in a general sense, and not in a specific sense. There was an attempt made at the bar to show that Ballydowney proper did include all the other descriptions; but it is equally true that Ballydowney is the proper name and denomination of a specific estate. Then it is perfectly clear from the language used by the testator, that Ballydowney here being associated with Clyney and Farranaspig, is used in the sense of Ballydowney proper, and not as a general denomination including something else. That is corroborated by the only document

that can be used by way of evidence, namely, the affidavit of the judgment creditors on entering up their judgments; from which it is perfectly clear that there were four separate and distinct estates, of which Ballydowney was one, the others being those of a specific denomination, Clyney and Farranaspig.

The question is, therefore, whether the testator had a * pecuniary or other interest (if interest it can be called) in * 386 the estate called Groyne. It appears that, in the year 1840, he had made a grant of that estate, which, so far as I am able to apply the Irish law applicable to it, appears to me to have divested him of all possibility of interest in the land, and to have left him only the owner of a rent charge or rent seck issuing out of those lands. Therefore, strictly speaking, he could not be said to be possessed of Groyne at the time of making the lease. The utmost that he could be said to be possessed of was the possibility of an interest in it.

But, my Lords, I think it is unnecessary for you to found your judgment at all upon the peculiar tenancy or right or interest which the testator had in it at the time of the devise. If he had not made the grant of 1840, I should have humbly recommended your Lordships to have arrived at the same conclusion, namely, that the three specific estates which are described by their proper names here, pass under the words "the aforesaid lands," and that that is the full extent of the gift made by the will.

I therefore humbly submit to your Lordships that the orders of the Court below, both of the Court of Appeal and of the Master of the Rolls, be reversed. If any costs or deposit have been paid under those orders, they must be returned to the appellant. Then, my Lords, I would add to that order of reversal a declaration, that under the devise made by the testator of "the aforesaid lands," the lands of Groyne, or his interest therein, did not pass; and with that declaration remit the cause for further consideration to the Court below.

LORD CRANWORTH. — My Lords, my noble and learned friend has so very * clearly and distinctly stated the grounds * 387 upon which he dissents from the judgments of the Court below, that, concurring as I do entirely in those views so expressed, I hardly think it necessary to add a single word. I will just make a suggestion which I hinted at in the course of the argument. Sup-

posing the testator, instead of enumerating three out of the four lands, had only enumerated one, could it have possibly been argued that all the other three were intended to be included? Again, read the passage at the beginning of the will without the words "which said lands are." Read it thus, "being possessed of a lease for lives renewable for ever of certain lands in the county of Kerry in Ireland, denominated Ballydowney, Clyney, and Farranaspig," and afterwards, "I give all the aforesaid lands." Could anybody have doubted that nothing would have passed except those lands? If so, it is a refinement indeed to contend that the putting in "which said lands are" makes any possible difference. "Which said lands are"; what lands? "Certain lands in the county of Kerry." What lands? Because "certain" they are not till you have made them certain. Then, coupling it with the rest, it is seen that they are those three parcels of lands and those alone.

My Lords, it appears to me to be perfectly clear (and I must own that I think there is great weight in the last observation of my noble and learned friend), that it is a strain upon language to call the Groyne lands, lands of which he was possessed. Perhaps in point of law, in one sense, it might be said that he was possessed of them; but popularly he was not possessed of them. He had an interest in the shape of a rent charge of 70*l.* a year issuing out of them. I do not go into the question of whether in point of law that would have passed it or not: but if you at all step * 388 out of the words of the will and speculate * upon what he meant, I do not think he did mean to include them.

LORD WENSLEYDALE. — My Lords, I am entirely of the same opinion with my noble and learned friends who have preceded me. I cannot help thinking that these difficulties would not have arisen if the Irish Courts would have attended to what their duty is in the construction of all wills, not to speculate upon the meaning of the words used by the testator, which lets in the consideration what he intended to have done; but to recollect strictly that their duty is to look at the words of the will and see what the words of the will mean: a duty which has been pointed out before in an admirable work of Sir James Wigram, a work very well worthy of the attention and study of every student of the law. The duty of the Judges is to ascertain the meaning of the words of the will.

And if we do look at the will fairly, I do not think there is any difficulty in construing it to be, not a devise of all the lands included in the first lease, but a devise of particular lands, which he correctly says are included in that lease. That is all that by the words of the will he can be construed to mean. Therefore, my Lords, after all the consideration I have been able to bestow upon the case, I think that it does not admit of the least doubt that it must be confined to what passes under the description of the lands Ballydowney, Clyney, and Farranaspig. There is not a word in the will which extends beyond them. Therefore, in the result I entirely agree with my noble and learned friends that the judgment of the Court below must be reversed.

It was ordered, that the order of the Master of the Rolls in Ireland, of the 17th of April, 1863, and the said * decree * 389 or order of the Court of Appeal in Chancery in Ireland, on the 16th of June, 1863, be reversed ; and that the order of Master Brooke, of the 6th of January, 1863, made on the cause petition to him referred, and in the proceedings mentioned, be and the same is hereby affirmed ; and it is further ordered, that if any costs shall have been paid under the order of the 17th of April, 1863, or the decree of the 16th of June, 1863, by the appellant to the respondent, they should be returned to the said appellant ; and it was declared, that under the devise made by the testator of " the aforesaid lands," in the proceedings mentioned, the lands of Groyne, or his interest therein, did not pass ; and with this declaration, the cause was remitted back to the Court of Chancery in Ireland.

Lords' Journals, 16th March, 1865.

BOWES v. HOPE LIFE INSURANCE CO.

1865. March 28, 30. 1

BOWES, *Appellant*.The DIRECTORS, &C. OF THE HOPE LIFE INSURANCE AND GUAR-
ANTY COMPANY, *Respondents*.*Winding-up Acts.* 10 & 11 Vict. c. 78. 19 & 20 Vict. c. 47.
25 & 26 Vict. c. 89. *Creditor. Assignee of a Judgment.*
Practice when Judgment impeached.

The 8th part of the "Companies Act, 1862" (25 & 26 Vict. c. 89) includes and applies to all companies which had been registered other than (as well as) companies registered under that Act itself. "Registered companies" there means registered under that Act itself; "unregistered companies" all those which had been registered under other Acts antecedently to its passing. Therefore, an insurance company which was formed in 1852, and registered under the Act of 1844 (7 & 8 Vict. c. 110), and which ceased to carry on business in 1855, was held to be capable of being made the subject of a winding-up order under the 25 & 26 Vict. c. 89.

* 390 Ordinarily speaking, it is not under the provisions of the 25 & 26 * Vict. c. 89, § 199, a discretionary matter with the Court, when a debt, due by a registered company, has been established and remains unsatisfied, to refuse to the creditor an order for winding up the company.

But (per LORD CRANWORTH) it is possible that a case might occur in which the Court could refuse such an order.

H., an insurance company, registered under the "Joint Stock Companies Act, 1844," granted a policy on a life. H. transferred its business and its liabilities to another company, M. The life fell; an action was brought against the H. Company. Several pleas were pleaded: a director and agent of the M. Company entered into a negotiation with the plaintiff and got the policy transferred to himself; the pleas were then withdrawn, and judgment entered against the H. Company. The director then assigned the policy and judgment to B. as trustee for another person. Execution was issued, and a return of *nulla bona* made. B. then presented a petition for a winding-up order against the H. Company. The Master of the Rolls granted the order. The Lords Justices offered to B. the opportunity of going into evidence in support of his claim, which was alleged by the H. Company to be collusive; but he refused to do so, insisting that that company could not impeach it except by filing a bill to stay the judgment. On this refusal the Lords Justices discharged the order of the Master of the Rolls: —

Held, that the order of the Master of the Rolls could not be sustained, the H. Company being entitled to file a bill to impeach the judgment. But the petitioner was not bound, as a preliminary to his right to the order, to go into

further evidence in support of his claim, for, there being a judgment in his favour, the burden of impeaching it lay on the company. The order of the Lords Justices was therefore reversed, and the petition was ordered to stand over until a fixed day, on the respondents undertaking to file a bill to impeach the judgment.

The costs of the appeals to the Lords Justices and to the House were ordered to be costs in the cause.

THIS was an appeal against a decision of the Lords Justices, overruling a previous decision of the Master of the Rolls.

The "Hope Mutual Life" Assurance Society was, on the 20th April, 1852, duly registered under the 7 & 8 Vict. c. 110. The capital (100,000*l.*) was divided into * ten thousand * 391 shares of 10*l.* each. The sum of 1*l.* alone was called up. The society at once commenced business and granted several life policies. On the 5th February, 1855, Hermann Galles effected an insurance for 1000*l.* on his own life. It was one of the conditions of the policies effected by the company, that the funds of the company should alone be liable, and that individual shareholders should be exempted from all personal responsibility. In August, 1855, the Hope Company transferred its business and effects to the Mitre Life Assurance Company, and the Mitre Company, taking possession of the property of the Hope Company, adopted its existing policies and undertook to indemnify it against all its liabilities. This policy and three small annuities constituted these liabilities. Hermann Galles died on or before February, 1856, and in the course of that year a claim was made against the Hope Company in respect of his policy. The matter was discussed in letters between Messrs. Cotterell the solicitors for the claimant, and the officers of the Mitre Company. In May, 1857, administration of the effects of Hermann Galles was granted to John Gaspard Schlappfer, who in July, 1857, brought, in the Queen's Bench, an action on the policy, against the Hope Company. There were several pleas put on the record on the part of the company. Ferdinand Philip F. Strousberg was at that time a director, and the agent and manager of the Mitre Company, and he entered into a negotiation with Schlappfer's attorney, the result of which was an agreement, dated 11th February, 1858, by which, in consideration of the sum of 700*l.*, Schlappfer was to assign the policy and the judgment thereon to Strousberg. The pleas which had been entered to the action were in consequence withdrawn,

and judgment was signed, by default as against the Hope Company, for 1201*l.* 10*s.* debt and costs.

* 392 * The policy and judgment were assigned to Strousberg by deed dated 12th August, 1858, the deed stating the consideration as 700*l.* duly paid. In December, 1858, a summons was obtained against certain shareholders of the former Hope Company to show cause why execution should not be issued against them on this judgment, under the 66th and 68th sections of the 7 & 8 Vict. c. 110, which summons was dismissed with costs.

In November, 1860, the Mitre Company was ordered to be wound up. On the 12th January, 1861, a deed was executed between Strousberg and John Bowes, which declared the payment by the latter to the former of 1320*l.*, in consideration of which Strousberg assigned to Bowes the policy and the judgment. Execution was issued thereon, and *nulla bona* returned. On the 25th February, 1862, a writ of *sci fa.* was issued by Bowes against William White, a shareholder and director of the Hope Company, to revive the judgment. White pleaded that he was not a shareholder; that the judgment had been satisfied; that it was obtained by fraud between Strousberg and Schlappfer, and that it had been obtained in an action upon a policy by the terms of which the funds of the society and not the individual shareholders were to be liable. This action had not since been proceeded with.

On the 5th February, 1863, Bowes presented his petition to the Master of the Rolls, setting forth the policy and judgment, and praying that the Hope Company might be directed to be wound up. On the 21st February, 1863, his Honour made an order to that effect. On appeal to the Lords Justices, an opportunity was offered to Bowes to go into evidence as to the debt, which was alleged by the Hope Company to have been collusively obtained; this he declined to do, and insisted that the Hope Company, if it disputed his claim, was bound to file a bill to impeach

* 393 * it, but that as matters then stood he was entitled to maintain the winding-up order. The Lords Justices, on the 19th March, 1863, discharged the order of the Master of the Rolls, with costs.¹

The present appeal was then brought.

¹ 1 N. R. 542.

Mr. Selwyn and *Mr. Cracknall*, for the appellant. — It is not a matter of discretion, in a case like the present, for a Court to grant or refuse a winding-up order. Where a debt exists which is not satisfied, it is the duty of the Court to grant the order for winding up. The 25 & 26 Vict. c. 89, § 199, gives the Court power to make a winding-up order, and the true construction of that section is, that when the circumstances there mentioned exist, the company shall be wound up. The word “may” in that section describes the power of the Court, but does not refer to any discretionary exercise of that power; it simply announces what the Court is to do under certain circumstances. It is the same as if “shall” had been used. *Dwarris on Statutes*; ¹ *The King v. Barlow*; ² *Macdougall v. Paterson*.³ It was no answer to such an application as this, made on the part of a creditor of the company, a creditor whose claim was established by a judgment, to set up a doubt of the validity of that claim. If its validity was really intended to be impeached, the party impeaching it was bound to file a bill, and without that being done, the claim must be taken to be good. A judgment cannot be impeached on a mere surmise. In *Scott v. Colburn*,⁴ bills of exchange * had been * 394 given by the directors of a company, who, by the terms of the company’s deed of settlement, had an authority to give them; and the same director executed a mortgage under the seal of the company, the real object of which was, to secure the payment of the bills; the mortgage, however, was treated as a legal title to payment of a sum of money; and it was held, that on a bill of foreclosure the mortgage deed could not be impeached as a mere security for the bills, and therefore as an instrument, which the directors had no power to execute, but must be treated as valid until set aside by an independent proceeding. A judgment is of greater force and validity than a mortgage deed. To refuse the appellant the order for winding up the company, is in effect to refuse him any remedy whatever, although he has already a judgment of a Court of competent jurisdiction in his favour.

This company is one described by the words “unregistered company” in the Act of 1862. It is a company not registered under that Act, and those words were intended to include all companies other than those which were registered under that Act.

¹ Page 604. ² 2 Salk. 609. ³ 11 C. B. 755. ⁴ 26 Beav. 276.

Mr. Hobhouse and *Mr. Charles Beavan*, for the respondents. — There is not in this case any ground for making an order to wind up the company. The order was made under the Act of 1862 (25 & 26 Vict. c. 89), but that Act does not do more than give the Court a discretionary power to make it. The word is “may,” and it would be absurd to suppose that a Court is bound on the bare application of any unsatisfied creditor to order the winding up of a company. The cases cited on the other side, where “may” * 395 is to be read “shall,” do not apply here; they * were all cases in which a public purpose was to be served by the exercise of the power; here it was merely the settlement of a disputed account between shareholder and shareholder, a case in which Lord Cottenham was of opinion that the Court ought not to interfere. *Ex parte Wyld*.¹ The case of the Catholic Publishing Company² also proceeded on that principle. Here, too, the debt itself is disputed, the respondents contending that all the liability on the policy had been undertaken by the Mitre Company; and the affidavits going to show that the judgment here was collusive, and that having been suffered through the agency of an official of that company, the judgment was then transferred to him for the very purpose of endeavouring to make the shareholders of the Hope Company discharge the claim. The judgment being thus impeached, it lay on the appellant to show its fairness, and to establish thereby an equitable title to relief. But further, this company is not one which can be wound up under the Act of 1862. It is a company which was registered under the Act of 1844 (7 & 8 Vict. c. 110), an Act which does not give to any one such a right as that of compelling the winding up of a company. The Act of 1848 (10 & 11 Vict. c. 78) only gave to a contributory the right to ask for a winding up. The appellant here is not a contributory, and so cannot proceed under that Act. This company was created and was registered in 1852 (registered under the Act of 1844), and it ceased to carry on business in 1855. At that time no one but a contributory could apply for an order to wind up a company. The title to do so was not given to a creditor till it was conferred by the Act of 1856 (19 & 20 Vict. c. 47), and * 396 that Act therefore * does not apply to a case like the present. [THE LORD CHANCELLOR. — The provisions of the Act of 1856 are retrospective, and apply to all existing companies;

¹ 1 Macn. & G. 1.² 10 Jur. N. S. 301.

they were swept away by the Act of 1862, which substituted its own provisions for them. Does not that Act apply in this case?] It does not. There are only two sets of companies mentioned in that Act, "registered companies," which are those registered under that Act itself, and "unregistered companies," which this company was not in any sense of the term. In the *Torquay Bath Case*¹ it was held that "unregistered companies," in the Act of 1862, applied only to companies not registered at all, and not merely to a company not registered under that particular Act. The order of the Master of the Rolls in the case is expressly made under the authority of the Act of 1862, but that Act in reality gives no authority to make it, for that Act does not affect companies which like this were registered under the Joint Stock Companies Act of 1844. [THE LORD CHANCELLOR. — The 199th section makes the Act applicable to "all companies incorporated by Act of Parliament, and not registered under this Act, and hereinafter included under the term 'unregistered companies.'"] But that section is explained and overridden by the 175th and 176th sections. By the 175th section, the phrase "Joint Stock Companies Acts," is declared to mean the Acts of 1856 and 1857, and the Limited Liability Act; but the Act of 1844 is expressly excluded from its operation. The 176th section follows upon the same distinction, referring only to the "said Acts," which are of course the Acts mentioned in the previous section and no other. This company, therefore, which was neither registered under the Act of 1862 nor * under the Acts specially mentioned in it, can- * 397 not fall under its operation.

The appellant will not be deprived of all remedy if he has any just claim to enforce. He has his remedy against the Mitre Company, the funds of which are liable to the holders of this policy. *Evans v. Coventry*; ² *Talbot's Case*; ³ *Hutchinson v. Wright*.⁴ On him lies the burden of showing that he has a valid claim, and, till he does so, he is not in a position to come into a Court of equity and ask for relief. To say nothing of the imputation of collusion and fraud that exists in this case, it is clear, on the appellant's own showing, that he is the mere assignee of a chose in action. He is, therefore, not a person "interested in law or equity"; he is a bare trustee; and there is no case in which such

¹ 32 Beav. 581.⁵ 5 De G. & S. 386.² 2 Jur. N. S. 557.⁴ 25 Beav. 444.

a person has been held capable of maintaining a proceeding of this kind.

Sir H. Cairns replied.

THE LORD CHANCELLOR (LORD WESTBURY), after stating the facts of the case, said : As to the special condition in the policy that the funds of the company were alone to be liable, and that the shareholders should be exempt from all personal liability, as the amount of the shares has not been paid up by the shareholders, of course the amount of unpaid calls on the shares would fall under the character of property of the company.

Such being the circumstances of the case, Mr. Bowes presented his petition to the Master of the Rolls for the purpose of obtaining an order for the winding up of this company. And by * 898 that petition he alleged (and I think * quite rightly in point of law) that the company comes within the 8th part of the Joint Stock Companies Consolidated Act of 1862, the company being included under the denomination of "unregistered companies," which is the term found in the 8th part of the Act, and which I think plainly includes all companies that had been registered, other than companies registered under that particular Act of 1862. The meaning of the phraseology of that Act appears to be this : that the words "registered companies" when used in the Acts mean companies registered under the Act itself. And "unregistered" companies mean those companies which had been registered antecedently to the passing of the Act. This Hope Insurance Company had been registered under the original Act of 1844 ; it was therefore what the Act of 1862 called an "unregistered company."

That Act defines the cases in which a winding-up order may be made. And the cases that are so defined are put as *criteria* of the insolvency of the company, and as bringing a company to which any one of the *criteria* applies within the category of a company that ought to be wound up under the Act. Now one of those *criteria* is this : where a judgment has been recovered against the company and execution issued upon the judgment, to which execution there is a return of *nulla bona*, that is accepted as a sufficient proof of the insolvency of the company. That appears to have occurred in this case. An execution was issued under the judg-

ment which had been obtained in the manner described, and the sheriff returned *nulla bona* upon that execution.

Under these circumstances, the application was made to the Master of the Rolls for the purpose of obtaining a winding-up order; and the representatives of the Hope Insurance Company appearing upon that occasion, insisted * very strongly, * 399 that, under the circumstances of the case, an opportunity should be afforded to them of impeaching the judgment by filing a bill for that purpose. His Honour appears to have thought that the same opportunity of inquiring into the merits of the debt would be afforded to the company, perhaps in a more efficient manner, under an order for winding up, if that order were at once made. His Honour, therefore, appears to have declined to accede to the request, that the petition should stand over upon the undertaking of the respondents to file a bill, and his Honour made the order for winding up.

The order being made, and the company thereby being no longer in a condition to file a bill, carried that order by way of appeal to the Lords Justices. And I think your Lordships will agree with me, that the order made by the Lords Justices can in no wise be sustained, because although it might have been, and perhaps it will appear to your Lordships that it would have been, very right to afford to the respondents, under the particular circumstances of this case, the delay that they desired, in order to give them the opportunity of filing a bill to impeach the judgment, yet it cannot by any means be a correct thing to impose upon the judgment creditor, the petitioner for the winding-up order, the obligations which the Lords Justices have imposed, of still further adducing evidence in support of his case. The order made by the Lords Justices, and by which they discharged the order for winding up the company which had been pronounced by the Master of the Rolls, is distinctly based upon this foundation, that inasmuch as their Lordships had offered to the winding-up creditor an opportunity of going into further evidence as to his claim, and inasmuch as he had declined to accept that offer, and had insisted that the company ought to be put to file a bill or to take proceedings * to impeach the judgment, their Lordships at once * 400 decided that the order of the Master of the Rolls should be discharged. Now unquestionably, whatever may be thought of the propriety of the order of the Master of the Rolls being at

once pronounced, without regard to the request of the respondents, there can be no doubt that there was a miscarriage here, in discharging the order for the winding up, unless the appellants who had obtained the order would undertake to go into further evidence as to this debt.

I think your Lordships will agree with me, although I confess I come to the conclusion with some hesitation, and in submission to the opinion of the majority of your Lordships, but at all events I think your Lordships will agree with me, that what the present appellant insisted upon before the Lords Justices was quite right. I find it stated that he insisted that the respondents ought to be put to file a bill, or to take other proceedings to impeach the judgment debt. Now, my Lords, I apprehend that your Lordships, founding yourselves upon the principle that opportunity should be given for ascertaining the equal justice of the case, will accede to the proposition which has been contended for by the appellant, and will tell the respondent that although you cannot agree with the Master of the Rolls in the propriety of at once pronouncing the order for winding up, yet you certainly cannot agree with the Lords Justices in imposing on the present appellant the obligation of adducing further evidence; but that under the circumstances of this case, and particularly having regard to the manner in which this judgment was obtained, your Lordships will think it just and right to afford to the respondents now, an opportunity of giving an undertaking and of redeeming that undertaking,

*401 by filing a bill to impeach the judgment; and *that your Lordships will on the present occasion substitute for the Lords Justices' order, and for the order of the Master of the Rolls, that order which under the circumstances of the case your Lordships would have thought it right to pronounce, if you, instead of the Master of the Rolls, had originally heard this petition.

I must therefore now, bowing to your Lordships' opinion, submit to your Lordships the present form of order, instead of that pronounced in the Court below: "That this House doth discharge the order of the Lords Justices, except so far as that order discharges the order of the Master of the Rolls; and in lieu thereof, the House doth order that the petition for the winding-up order shall stand over until the 8th day of May, 1865, the respondents undertaking in the mean time to take proceedings for impeaching the judgment. And either party is to be at liberty on the said 8th

May to apply to the Master of the Rolls. And the costs of the appeal to the Lords Justices, and of the present appeal, to be costs in the winding up, in case an order for winding up the company shall be made."

LORD CRANWORTH. — My Lords, I believe there has been no difference of opinion at all amongst any of your Lordships that the order pronounced by the Lords Justices is one which cannot be supported ; and the only question is, what order ought the House to make, starting from the point that the order of the Lords Justices cannot stand ?

The real question here is, whether the Master of the Rolls, before whom the matter originally came, had before him a case in which there was such a clear proof of a valid debt, both at law and in equity, that he had no other course to take but immediately to direct the winding * up ; because I agree with * 402 what has been said, that it is not a discretionary matter with the Court when a debt is established, and not satisfied, to say whether the company shall be wound up or not ; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it ; but, ordinarily speaking, it is the duty of the Court to direct the winding up. But here I must confess I cannot say that this debt is so clearly made out to my mind as being a valid debt at law and in equity that I think the Court was bound to direct the winding up, if there was any mode by which the validity of the debt could be better established before that order was made. And I think, if a discretion is ever to be exercised as to the course to be pursued preliminary to deciding whether there is to be an order for winding up or not, it is such a case as this, where, *ex concessis*, this is the sole debt. When I say "the sole debt," there are also two small annuities upon the lives of two parties, amounting together to about 40*l.* a year ; but I think those may be disregarded in considering this question. Therefore this is, in fact, a single creditor claiming under a judgment of a rather suspicious character, to put the machinery of the Joint Stock Companies Act in motion for the purpose of winding up this company, in order that he may have his debt paid.

My Lords, I must confess that although there are two modes in which this investigation might take place, I think the one which

has been suggested by my noble and learned friend is by far the more convenient, because I think it is by far the less expensive. The debt may be investigated either by proceedings instituted by those who impeach it, in order to set it aside, or *403 by making a * winding-up order, so that the official liquidator under the winding-up order may himself institute proceedings to investigate the matter. In general, perhaps, that would be the cheapest and best course. But here, considering that this was the only debt to which the attention of the official liquidator would have to be directed, I think that by far the cheapest and most expeditious mode would be to leave it to the person impeaching this debt, within a very short time, to raise the question by filing a bill. If he successfully impeaches it, there will be an end to the case. And if not, the form of order which has been suggested by my noble and learned friend provides very properly for the case; and all the costs that have been incurred will then fall upon the company, if the winding-up order is established. Otherwise it will be in the discretion of the Court to decree by whom they are to be paid.

LORD KINGSDOWN. — My Lords, I entirely agree with my noble and learned friend who has last addressed your Lordships. Everybody must feel that (as it is here stated) this is a case in which there is the gravest possible doubt as to the genuineness and fairness of this transaction. It is clear that it must be investigated, and thoroughly investigated. And the only question is, in what manner that investigation will best take place. Now, my Lords, if it be the fact (as I presume it is), that under a winding-up order the expenses would come out of the estate, and the costs of those proceedings were to be included in those costs, it might turn out — I do not say at all that it would — but it might turn out that the grossest injustice would be done, and that in fact an alleged creditor, who really had no debt at law or in equity, would *404 have thrown upon the shareholders * of this company the expenses of winding up in a case in which there was really no foundation whatever for the charge against them. I quite agree, therefore, with my noble and learned friend who has last addressed your Lordships, that the order proposed by the Lord Chancellor is the proper order; and I trust that the result of that order will be that justice will be done.

Mr. Selwyn. — Will your Lordships forgive me for mentioning this: I stated before that we had actually paid the costs which were directed by the Lords Justices' order to be paid.

THE LORD CHANCELLOR. — Of course they must be repaid.

Ordered, that the order of the Lords Justices be reversed, except so far as it discharges the order of the Master of the Rolls; and that, in lieu thereof, the petition be ordered to stand over until the 8th of May, 1865, the respondents undertaking in the mean time to take proceedings for impeaching the judgment; and that either party may be at liberty after the 8th of May to apply to the Master of the Rolls. The costs of the appeals to this House, and to the Lords Justices, to be costs in the winding up, in case an order for winding up be made. Costs already paid by the appellant to the respondents to be repaid.

Lords' Journals, 30th March, 1865.

1865. February 28; March 2, 3, 6, 9, 10, 30.

LOUISA BOLDERO, *Appellant*.

The DIRECTORS OF THE EAST INDIA COMPANY,¹ *Respondents*.

*Bengal Civil Service Annuity Fund. Payment in Excess.
Refunding.*

A proposal was made to establish, by the subscription of individuals (if approved of and aided by the East India Company), a fund for the purpose of creating, at the end of a certain number of years' service, a retiring pension to be held by members of the East India Company's civil service in Bengal. The directors did approve of the proposal, and undertook to pay in every year a sum equal to that subscribed by the subscribing members. They suggested rules which were adopted, and in the course of the correspondence between the directors and the subscribers, it was settled, by order of the directors and consent of the subscribers, that a subscriber should pay a certain percentage on his salary during the whole time of his service, and that if, when he wished to retire, he had not paid half (the other half being contributed by the company)

¹ Secretary of State v. Underwood, Law Rep.'4 H. L. 588, 605.

of the amount of the principal of the retiring pension (which was fixed at 10,000 rupees, or 1000*l.*) he must fully make up his half; but nothing was expressly declared as to what should be done with the excess, if his payments had exceeded the amount of the half: —

Held, affirming the judgments of the Courts below, that the subscriber was not entitled to have such excess refunded.

THIS was an appeal against the judgment of Lord Chancellor Campbell, confirming a previous decision of the Master of the Rolls.

John Stephen Boldero had been a civil servant of the East India Company on the Bengal establishment, and had contributed to "The Bengal Civil Service Annuity Fund," during the whole of the time he was in the company's service. On his retirement from the service in 1852, he was entitled to a pension from this fund, which was formed partly by the contributions of subscribers,

* 406 * and partly by sums granted annually by the East India Company, in aid of it. The main object of the institution of the fund was not merely to secure retiring pensions, but by making them considerable in amount to induce officers in the civil service not to delay their retirement to the last moment. In this way the subscribers were benefited by getting more early promotion on the retirement of the seniors among them, and the company was benefited by having a more early and constant succession of officers while still in the vigour of life. Both parties, therefore, felt an interest in its success.

The annuity fund was projected in 1824, and established in 1825. Much correspondence passed between the projectors of the fund and its managers on the one hand, and the directors of the East India Company on the other. This correspondence constituted the contract between the parties, and it was alleged by Mr. Boldero, and after his death by his widow, the present appellant, that it was one of the provisions of that contract, that if a civil servant (who was obliged to subscribe during the continuance of his service) paid in by his subscriptions more than half the amount of the principal of the annuity he was to receive, he was entitled to be repaid that excess. This was denied by the respondents, and this was the question in dispute.

A bill had been filed by Mr. Boldero against the directors of the East India Company, claiming the refunding of the sums which he had paid in excess of half the principal of his annuity. This

sum he alleged to amount to 49,419 rupees (about 4948l.) The Master of the Rolls decided¹ that the terms of the contract did not justify that claim. On appeal to the Lord Chancellor, that decision was * affirmed.² This appeal was then brought, * 407 and the Secretary of State for India appeared as substitute for the directors of the East India Company, as respondents.

Sir F. Kelly, Sir H. Cairns, and Mr. Joseph Chitty appeared for the appellant.

Mr. Bovill, Mr. Forsyth, Mr. G. Markham Giffard, and Mr. W. H. Melvill were for the respondents.

The question being one entirely dependent on the terms of the correspondence, which was fully referred to by each noble and learned Lord in giving his judgment, it has not been deemed necessary to report the arguments of counsel. The cases of *Blunt v. Halliday*,³ *The East India Company v. Robertson*,⁴ and *Davis v. The Trustees of the Madras Civil Service Annuity Fund*,⁵ were referred to in illustration. In *Blunt v. Halliday*, which related to the fund, the claim for repayment of the excess was disallowed. In the other cases, the claim was partly upon the particular terms of the correspondence there, but still more on the conduct of the directors with regard to the Madras fund, sustained, and the decision of the Supreme Court at Calcutta was in *Robertson's Case* affirmed by the Privy Council. In *Davis's Case*, the money appeared to have been refunded without any appeal being brought.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, in the year 1822 the civil servants of the * East India Com- * 408 pany, at the Presidency of Bengal, were desirous of establishing a fund for providing pensions for members retiring from the service. On the 1st May, 1822, they addressed a memorial⁶ to

¹ 26 Beav. 316.

² 1 De G., F. & J. 313.

³ A case heard before the Court at Calcutta, in which the Court decided that under the particular terms of the Bengal arrangement there was nothing which would support a claim for a refund.

⁴ 7 Moore, Ind. App. 361; 12 Moore, P. C. 400.

⁵ 7 Moore, Ind. App. 364, n.; 12 Moore, P. C. 403, n. (b).

⁶ The paragraphs of this memorial are frequently referred to in the judgment.

the Court of Directors, praying for the establishment of a fund for this purpose. This memorial was accompanied by a copy of the resolutions passed at a public meeting, and also by certain proposed regulations for the establishment and management of the fund, out of which the retiring pensions were to be granted. The memorial contained this passage: "Besides, however, the pecuniary assistance which your Honourable Court may be pleased to afford, there is one arrangement by which your memorialists conceive your Honourable Court may essentially add to the stability and usefulness of the projected institution. They mean that the proposed subscription, at a rate not exceeding four per cent. upon all allowances, should be made imperative on all civil servants hereafter appointed, from the date of their first arrival in India to that of their departure. Unless this arrangement be adopted, it must be difficult, if not impossible, to establish a fund on any accurate or systematic plan; the subscriptions will ever be uncertain, and the subscribers will have no guaranty that they will in their turn obtain the annuity; whilst the non-subscribers will benefit by the acceleration of promotion caused by the operation of a fund to the interests of which they will have conducted nothing."

The memorial prayed that the East India Company would make an annual donation in aid of the fund, and also that the directors would receive the subscriptions of the members, and allow eight per cent. on the moneys from time to time in their hands.

* 409 * The directors, by their despatch of the 8th December, 1824 (which is the most important document in the case), whilst acceding in substance to the proposal, and promising more than had been requested of them, made very important alterations in the details of the scheme. This despatch defines and settles the relation in which the directors engaged to stand towards the fund and the subscribers thereto, and the altered regulations form the rules of the fund, and of the society of subscribers. The despatch, therefore, may be regarded as the contract between the directors and the subscribers, and the altered regulations as the contract of the subscribers among themselves, or, in other words, the rules of the institution.

The contract on the part of the directors laid down the following terms as the bases of the whole arrangement:—

First, that every subscriber should, so long as he remained in

the civil service, subscribe to the fund four per cent. on all his salaries and emoluments.

Secondly, that no subscriber should be entitled to an annuity until he had been in the service twenty-five years, and of that period had been resident in India for the full term of twenty-two years.

Thirdly, that the number of annuities to be given away should be nine in every year, and that each annuity should be 1000*l.* per annum, or 10,000 rupees, taking the rupee as equal to 2*s.*

Fourthly, that a separate account should be kept of each subscriber's annual subscriptions, which should be accumulated at the rate of six per cent., such interest being allowed by the East India Company, who may be regarded as the bankers of the fund. The object of this account was to ascertain the amount of each civil servant's * contribution when he should be en- * 410 titled to apply, and should apply, for a retiring annuity.

Fifthly, the directors stated that they considered it of essential importance that so far as might be practicable the advantages afforded by the fund should be available, to those eligible to receive them, upon terms of strict equality, which they explain to mean that the amount of the purchase money should depend upon the value of the annuity, which of course was to be regulated by the age of the annuitant.

Sixthly, the directors state that, in order to render the arrangement of important value to the service, the proportion of purchase money to be paid by the subscriber (which the committee of servants had fixed at two thirds of the whole value of the annuity) should be fixed at one half of the value of the annuity of 10,000 rupees, calculated according to a table set forth in their despatch ; and after explaining the working of the table, the directors in the 57th paragraph of the despatch use the following words : " But although in the mode here proposed all servants becoming annuitants will pay half the value of their respective annuities and no more, and will so far be placed on an equal footing, yet it has not escaped our observation that there will be a material difference in the value of the risks incurred by the several subscribers, of losing by deaths or early retirements the amount of their contributions."

I have cited this passage at length because it was chiefly relied on by the appellant's counsel as amounting to a contract, or at all

events to the declaration of a fundamental principle in the scheme, that in no case should any subscriber contribute to the fund more than one half of the value of his annuity. But it is plain that

the words have no such meaning; nor were they written

* 411 * with any such intention. They are words of reference

only to what had been previously written, and relate to the case that had been supposed of a subscriber having to make an addition to his subscriptions; in which case he was to add such sum only as would suffice to make up the amount, already standing to his credit, equal to one half the value of his annuity. But the case of the amount standing to a subscriber's credit being more than half the value of his annuity is nowhere dealt with except by the fundamental rule of the fund, which is frequently repeated, and which occurs in this same 57th paragraph, viz. that persons entering the service after the fund shall have been instituted will have to contribute during the full period of their service.

The directors' contract with the subscribers is very clearly defined in the 61st and 62d paragraphs of the despatch. The first engagement of the directors is to extend over a period of twenty-five years. During that period, subject to the condition that an annuity fund be formed in Bengal, upon the principles explained in the despatch, and under the modifications, which the directors prescribed in the regulations framed by the committee of civil servants, the directors engaged to contribute whatever sum might be required, in addition to the contributions of the subscribers, to enable the fund to grant such number of annuities as might be accepted under the prescribed regulations, not exceeding nine per annum.

In this passage it is plain that the word "contributions" includes the subscriptions of the civil servants during the full period of their service, and also such purchase moneys, sometimes called fines, as might be payable wherever the sum standing to the credit of a subscriber to whom an annuity was awarded, did not amount to one half the value of the annuity.

* 412 * It is one of the modified and finally agreed on regulations which form the deed of settlement of this fund, as among the subscribers themselves, that every civil servant should contribute to the fund during the whole period of his service. And this condition therefore, which, as we have seen, was strongly insisted on in the outset, is a fundamental part of the contract of

the subscribers *inter se*, and also of the contract between the subscribers and the company.

The nature of the directors' engagement is still more fully developed in the 62d paragraph of the despatch. They guarantee the sufficiency of the fund during twenty-five years; but the fund that is guaranteed is a fund receiving the contributions of subscribers during the full period of their service. At the end of the twenty-five years a new adjustment is to be made, and the company's contribution is then to be finally limited to the sum which, when added to the contributions of subscribers and to the income derived from the accumulated balance, will make a total income equal to the grant of nine annuities annually, according to the valuation which shall then be fixed.

Every part of the scheme depends on the constitution of the fund; and the fund is constituted of the annual subscriptions of the civil servants at the rate of four per cent. on all salaries and allowances during the whole period of service, and of supplementary sums to be paid by annuitants, whose accumulated subscriptions shall not amount to one half the tabular value of the annuities; and also of an annual donation by the company equal to the amount of the annual contributions by the subscribers; but with the important stipulation contained in the 62d paragraph of the despatch, by which it is provided, that if at the end of any period during the first twenty-five years the balance of the fund should be found to exceed the * calculation, then an annual * 413 deduction, equal to the income derived from the excess of balance, should be made, either from the company's contribution, or from the rate of interest allowed on the accumulations of the fund, at the option of the directors; and at the end of the twenty-five years the company's contribution should be limited in the manner which has been already mentioned.

The appellant admits that there was a clear obligation on every civil servant who entered the service after the formation of the fund to contribute to the fund during the whole period of his service. And it follows, that the right to receive back any part of those payments, must be proved by something equally clear with the obligation under which the payments were made.

There is nothing on which such claim for repayment can be founded, and any such right would be at variance with the spirit and object of the institution.

A good deal of the argument of the appellant's counsel was founded on what was afterwards done by the East India Company; and the occurrences require a few words of explanation.

It must be premised that the 30th of the general regulations of the fund as altered and approved of by the company, gave power to a general meeting of the subscribers by a majority of three fourths of the members to determine upon any question whatever, and upon all general questions involving any increase or diminution of the rate of contributions then fixed, or any essential addition to, or alteration in, the original rules and principles of the institution which were then established, provided that no decision upon such question should be valid or have any effect until sanctioned and approved by the directors.

* 414 A few years after the institution of the fund, it was * found that there was not a sufficient number of candidates for the nine yearly annuities, and there being, in respect of such insufficiency, some excess of the fund, the directors proposed to the subscribers to resolve that during a limited period the amount to be paid for an annuity should be one quarter, and not one half of its tabular value; and a resolution was passed at an annual meeting accordingly, and was approved of by the East India Company. But after this resolution ceased by the expiration of the time to which it was limited, the East India Directors by a despatch dated the 12th November, 1841, proposed to the subscribers "that in the event of the balance of the subscription account of a retiring subscriber to whom an annuity shall have been reserved, or may be granted under the foregoing clause, amounting at the period of his retirement to a sum exceeding the half value of his annuity, the amount of such excess, above the half value, shall be refunded to him out of the proportionate sum which shall have been reserved to his annuity as above." This was the proposition made by the directors to be adopted or to be rejected by the body of subscribers; and we find that a resolution accordingly was submitted to a general meeting held at Calcutta on the 1st of January, 1842, but was rejected by a considerable majority of the subscribers. The directors treated this resolution of the subscribers as decisive of the question.

In a despatch written and sent by the secretary of the Civil Service Annuity Fund to the secretary of the Government of India, Financial Department, is the following passage, which appears to

me to express very accurately the principle of the original constitution of the fund : —

“The managers beg to deny that refunds of excess subscriptions above any valuation were ever contemplated * under the original constitution of the fund. It was origi- * 415 nally, and is now, the constitutional principle of the fund, that subscribers shall contribute during the whole period of their service, and shall not obtain any refund of excess subscription.”

My Lords, it remains only that I should refer to the Madras Civil Service Fund, and to the litigation respecting it. It appears that the rules of the Madras Civil Service Institution were the same originally as the rules adopted in the Bengal Presidency ; but that some few years after the establishment of the Civil Service Fund of Madras, a resolution was passed by the subscribers permitting the refunding of the excess of subscriptions. That resolution was not, however, approved of by the directors of the East India Company, and was therefore in no respect binding according to the principles of the established regulations. But it appears that in an official document circulated, and permitted to be received for some years, as containing the regulations of the fund, that resolution of the subscribers was entered as if it had been approved of by the directors, and was therefore a binding regulation. Subsequently, the question arose, and was discussed in one or two cases that were decided by the Supreme Court of Madras, one of which was carried by way of appeal to the Privy Council,¹ and it was then held, inasmuch as the East India Directors were privy to the circulation of the document setting forth the regulation in question, as if it were a binding regulation, they were estopped from denying that they had sanctioned that regulation. But the whole principle of the decision appears to admit that if it had not been for that regulation, and for the fact that the East India Company must be * taken to have given its assent to it, the * 416 regulations of the Madras Civil Service Fund would have received the same interpretation as that which I now submit to your Lordships ought to be put on the regulations of the Bengal Civil Service Fund.

The question in this case, encumbered, as it has been, and overlaid, by a great mass of superincumbent official documents, when

¹ The East India Company v. Robertson, 12 Moore, P. C. 400. See also Davis v. The Madras Service Fund, 12 Moore, P. C. 403, n. (b).

it is extricated from that load becomes very clear and simple in its nature. I must, therefore, move your Lordships that the decision of the Court below be affirmed ; but unless it should appear to your Lordships befitting to give a contrary direction, I should humbly submit that, having regard to the relation between the appellant and the respondents, although I am not at all insensible to the fact that this is an appeal to your Lordships' House after two adverse decisions, yet I think I should best express what I trust will be the feeling of your Lordships, when I move your Lordships to dismiss the appeal, but to say nothing upon the subject of costs.

LORD CRANWORTH. — My Lords, this case, though one of great importance, does not raise any difficult questions either of law or of fact. It must be decided entirely on the true construction of a few passages contained in two, or at most in three documents.

The civil servants of the East India Company in their Bengal Presidency, being desirous of forming a fund there, by means of which they might, after a definite term of service, be enabled to retire with a life annuity, drew up, and caused to be remitted to the Court of Directors, a memorial expressing this desire, stating the extent of contribution they were prepared to make, and

* 417 * soliciting from the company pecuniary aid towards the formation of the fund. This memorial bears date the 1st of May, 1822, and was forwarded to the Home Government in the following month of June. The memorial was accompanied by a string of proposed resolutions, thirty-six in number, by which the memorialists considered that the object they had in view might, with pecuniary assistance from the company, be attained.

The memorial was taken into favourable consideration by the directors, and they, by a public letter to Bengal, dated the 8th December, 1824, expressed their full approbation of the object of the memorialists, and their willingness to assist in the formation of such a fund as was proposed, even to an extent beyond that which had been asked, but they at the same time stated several alterations which they considered necessary in the regulations which had been transmitted with the memorial.

This despatch was accompanied by a copy of the regulations proposed by the memorialists, and of the observations of the company on such of them as they considered to require alteration. To a few of these it is necessary to advert.

By the first of these regulations it was proposed that the subscribers to the fund should from the 1st of January, 1824, contribute to the fund four per cent. on their salaries. To this the directors assented, merely substituting the 1st of May, 1825, for the 1st of January, 1824.

By the third regulation the civil servants proposed that the annuity to be granted should be 7000 rupees. But the directors insisted that every annuity must be fixed at 10,000 rupees, payable in England at 2s. per rupee.

By the fourth regulation it was proposed, that the annuities should be tendered to the civil servants according to their seniority on the gradation list. To this the * directors as- * 418 sented, only confining the grant to servants who should have been twenty-five years in the service, twenty-two of which must have been actually passed in India.

By the eighth regulation it was proposed, that the managers of the fund should exercise a discretion as to the number of annuities to be granted in any particular year. But the directors altered this, by substituting a clause limiting the number to nine annuities per annum.

The eleventh regulation as proposed was in these words, "Any subscriber who may accept the tender of an annuity shall be required, to entitle him to such annuity, to pay to the institution the difference between two thirds of the actual value of the annuity on his life, and the accumulated value of his previous contributions, in case the latter quantity shall be less than the former. These values shall be determined as below provided."

The directors on this regulation made the following note: "After the word 'institution' must be inserted the words 'previous to the date at which the annuity is to commence.' The words 'one half' must be substituted for the words 'two thirds.'"

I do not think it necessary to consider the other regulations.

The civil servants after receiving at Calcutta the despatch of the 8th December, 1824, together with the regulations as altered by the directors, agreed at a meeting held on the 12th of November, 1825, to adopt the regulations as so altered, with merely a few trifling changes of a verbal character; and so altered, the regulations were finally sanctioned by a despatch of the directors dated the 30th of May, 1827. These regulations relate exclusively to the

mode of forming and dealing with that part of the annuity fund which was to be furnished by the civil servants.

*419 * In order to ascertain what was the amount to be contributed by the company, we must refer to the despatch of the 8th of December, 1824, on which this liability is founded.

The despatch is divided into seventy-eight paragraphs; but the first thirty-two have no bearing on the question of annuities. The next eleven paragraphs, 33 to 43 inclusive, are confined to a general statement as to what had been done in former years with a view to the formation of an annuity fund, and as to the advantages which when formed it would offer to the service. The 44th paragraph is important; it is as follows: "In estimating the advantages to be derived from an annuity fund, we have directed our attention to four particulars, viz. the 'amount of each annuity; the number of annuitants; the proportion of the value of the annuity which should be paid by the annuitant; and, security that the annuities shall be regularly paid.'"

Paragraphs 45 and 46 deal with the first of these four particulars, and express the opinion of the directors that the annuity ought to be 10,000 rupees or 1000*l.* per annum, instead of 7000 rupees as proposed by the memorialists. The next five paragraphs (47 to 51 inclusive) deal with the second question, and give reasons why the annuities annually granted should be nine in number. The six following paragraphs relate to the third particular mentioned in paragraph 44, viz. the proportion of the value of the annuity which should be paid by the annuitant. The rest of the despatch, except the last three paragraphs, is devoted to the fourth question, namely, that which is called, in paragraph 44, security that the annuities will be regularly paid.

It is on the true interpretation of the paragraphs relating to the last two questions, that the present case turns.

*420 * With respect to the six paragraphs relating to the contributions to be made by the civil servants, it is to be observed, that no engagement is, or could be, entered into by the directors as to these contributions, except that whereas the civil servants had by the regulations accompanying their memorial proposed that they should in some way make up two thirds of the value of the annuity, to be ascertained when it should be granted, the company, by the 55th paragraph of the despatch, substituted one half for two thirds. With this remark I will postpone the

consideration of these six paragraphs till I have endeavoured to ascertain what is the engagement into which the directors entered under the fourth head of particulars mentioned in paragraph 44, i. e. the security for due payment of the annuities.

The discussion of this subject begins with the 58th paragraph. It is not unworthy of notice that the question is there stated as being a question as to the best mode of affording security by the company that there should be funds sufficient for payment of the annuities. And at the end of paragraph 59 they proceed to state the means by which the advantages of the proposed annuities might be secured. This they proceed to say must be, in the first place, by the contributions to be made by the civil servants themselves, i. e. in the first place four per cent. on their salaries and emoluments; and, secondly, the sums called fines, payable by every subscriber to make up one half of the value of the annuity. These payments were fully provided for by regulations 1 and 11.

The despatch proceeds in paragraph 61 to point out the obligation which the company took on itself. The directors say, that in order to promote the welfare of their servants, they had resolved that, in case an annuity fund should be formed in Bengal upon the principles * explained in the despatch, and under * 421 the proposed regulations as modified by the directors, they would contribute whatever sum might be required to enable the fund to grant the requisite annuities not exceeding nine per annum.

In order to effect this object, the directors agreed that they would credit the fund every year with a sum equal in amount to the four per cent. on the salaries and emoluments contributed by the subscribers. And the despatch contains an elaborate calculation for the purpose of showing that the sums thus paid into and credited to the fund with accumulations of interest, would probably produce a large balance every year beyond what would be necessary for securing the annuities; and it was stipulated for the company, that at the end of every five years it should be ascertained whether the balance actually realized was more or less than that which had been calculated on. If it was less the company was to make good the deficiency; if more, then the contribution by the company was to be reduced. At the end of twenty-five years the tables on which the value of the lives had been calculated was to be finally corrected, and thenceforth the company's contribution was to be limited to the sum which, when added to the

contributions of the civil servants and the income of the balance, should be sufficient to secure the regular payment of the annuities according to their value as then fixed.

The result of all this is shortly summed up in paragraph 63, in the following words: "Upon the principles which we have thus explained, the number of nine annuities annually is virtually guaranteed by the company, and the company's contribution is limited to the amount necessary for the accomplishment of that important object."

It seems to me clear that, according to these stipulations,
* 422 * what the company bound itself to do, was to guarantee to the civil servants the amount of the annuities, provided they made the contributions which, under the regulations as proposed by them, and finally sanctioned by the directors, they were bound to make.

What, then, were these contributions? Clearly, first, under regulation No. 1, four per cent. on their salaries and emoluments; and, secondly, under regulation 11, the difference between one half of the actual value of the annuity on the life of the person claiming it, and the accumulated value of his four per cent. contributions, in case they should be less than one half.

Here it is that the questions in the present case arises. The four per cent. contributions paid by the appellant, amounted, when he claimed his annuity, to more than one half its value. He had, therefore, nothing to pay under regulation 11. But he insists, further, that he is entitled to be repaid all which he has paid in excess beyond one half the value of his annuity, with interest at six per cent.

Such a claim could not possibly be sustained on any part of the despatch, or of the regulations to which I have hitherto adverted. The appellant paid only what, under regulation 1, he was bound to pay. He was under no obligation to pay any thing under regulation 11, and the company contributed all which was required to entitle him, when added to the payments he had made under regulation No. 1, to his annuity. The company guaranteed to him his annuity, he having paid all which under the regulations he was bound to pay.

But the appellant contends that there are other parts of the despatch which throw light on the case, and which show that there was an engagement by the directors express or implied

to refund, to any civil servant taking * an annuity, whatever * 428 he might have paid in excess beyond one half of its value.

The passages relied on by the appellant as leading to this conclusion are not found in that part of the despatch which relates to the amount to be contributed by the company, but in that which relates to the contributions of the subscribers.

One paragraph (52) is as follows: "The third point requiring attention is the proportion of the value of the annuity which should be paid by the annuitant, or, in other words, what shall be the sum paid by a servant, including his accumulated subscriptions, to entitle him to an annuity, if otherwise eligible? Upon which point we must observe that we consider it of essential importance that, so far as may be practicable, the advantages afforded by the fund should be available by those eligible to receive them, upon terms of strict equality."

The appellant contends that unless a subscriber who had, by his four per cent. contributions paid more than half the value of his annuity, was entitled on claiming his annuity to have his payments in excess repaid to him with interest, he would not be on terms of equality with another subscriber who had altogether only made up that half value. But even supposing the equality here contemplated was an equality in the amount contributed by the different subscribers, it would yet, I think, be a violent and forced construction to hold, that because the directors when speaking not of their own contributions but of the contributions of the civil servants, had said that they considered it of essential importance that, so far as might be practicable, the advantages afforded by the fund should be available by those eligible to receive them on terms of strict equality, therefore they meant that the subscriber who had contributed in excess should be * repaid the amount of * 424 that excess. But upon looking at the paragraph in question, and at that which follows it, I am satisfied that the equality spoken of did not refer to the sums contributed by the subscriber, but to the value of what he was to get in return for his subscriptions. In paragraph 53 it is said, that as the ages of the annuitants must naturally vary, it follows that to maintain strict equality the amount of the purchase money would depend on the value of the annuity regulated by the age of the annuitant; and at the end of paragraph 55 a table is given of the value of the annuity at different ages, from forty to fifty-two. I am satisfied that the

argument of the appellant, derived from the allusion to strict equality in paragraph 52, is unfounded, and that the equality contemplated was an equality in the value of the thing purchased, and not an equality in the amount of the purchase money.

The next two paragraphs, 54 and 55, appear to me strongly to show that the directors did not understand that there was to be any refunding. It has not been, and indeed it could not be, contended that any refunding was contemplated by the memorial and the regulations as proposed by the civil servants. The right to it rests wholly on the despatch, and on that part of it from paragraph 52 to paragraph 57 inclusive, relating to the sums to be contributed by the civil servants. But two of those paragraphs seem to me to show, that if no refunding was contemplated by the original memorial and the regulations which accompanied it, none was contemplated in the scheme finally adopted.

In paragraph 54 the despatch states the original proposal of the memorialists, that every subscriber, in order to entitle himself to an annuity, should be bound to pay up the difference between two

thirds of the value of the annuity and the amount of his
* 425 contributions, in case they * should be less than two thirds.

If the matter had rested there, no one could have contended that there was any claim for refunding in case of a subscriber having paid more than two thirds. It seems to follow, that when in the next paragraph the directors agree to reduce the two thirds to one half, the rights of the contributors must remain unaltered, except that the amount of their contributions was diminished. If there would have been no right to a refunding in the one case neither is there in the other.

This brings me to the 57th paragraph, which is that on which the appellant mainly relied, but which when closely examined seems to me to afford no support to his argument.

The first annuities were to be granted at the end of one year after the formation of the fund should have commenced, and these annuities would naturally be taken by servants who had before the formation of the fund run through the whole of their Indian career, i. e. twenty-five years' service. The first annuitants would therefore have only contributed their four per cent. for one year, and would have a very large sum to pay under regulation 11, in order to make up their half value of the annuity.

So far they would be on an equality with the other civil ser-

vants who were in the service when the fund was formed, and who would have to contribute annually for two, three, four, and even as to some for twenty-five years. But they would have this very great advantage, they would not have been exposed to the same risk of losing the benefit of their annual contributions by dying during the previous period of their service, before they could claim any annuity. The same thing must happen, though in a less degree, for many years to come. The sole object of this 57th paragraph evidently was to point out that * there was * 426 no way of providing against this inequality of benefit, which would exist for many years after the scheme should come into operation, except by excluding from it old servants who had completed or nearly completed their term of service. And the paragraph explains fully that if the old servants were not allowed to participate in the benefits of the fund, the younger members of the service would be deprived of the advantage of quicker succession in their career, as the old members would then have no inducement, so far as the annuity fund was concerned, to retire. The increased retirements of old servants would, it was pointed out, go far to countervail in favour of the younger members the advantages which, at the commencement, the older servants would necessarily possess.

This being the sole object of the clause, the question is, what effect is to be given to the language with which it commences? "But, although in the mode here proposed, all servants becoming annuitants will pay half the value of their respective annuities, and no more, and will so far be placed on an equal footing, yet it has not escaped our observation," &c. The appellant argues that this amounts, either alone or coupled with the five preceding clauses, to an engagement that no contributor to the fund ever should be called on to pay more than one half the value of his annuity; and so that any contributor who should by his four per cent. payments have contributed more than half the value of his annuity, calculated at its value when he should claim it, should be entitled to claim besides his annuity, repayment of all payments of excess of one half the value, with accumulated interest at six per cent.

I think it would be unreasonable to give such an effect to these words, directed as they evidently were to a * special * 427 class of cases, and not expressing or being intended to express any contract or engagement on the part of the company.

Treating them as intended only to point out to those who, when they joined the institution, were young in the service, that though the older servants would necessarily have some advantages, yet they would, in fact, equally with themselves, have to make up the one half value of the annuity, and by retirements would open the way to more rapid succession in the service, the words are sufficiently accurate. Considering, then, these words as from the part of the despatch in which they occur, we are bound to consider them, not as forming any part of what the company undertook to guarantee, but as used for an altogether different purpose, I think it impossible for the appellant to deduce from them a contract or engagement, that all contributions of a civil servant beyond the half value should be returned to him.

I have omitted to mention what seems to me very material as excluding any notion of refunding, namely, that in the long and elaborate calculation contained in the report, showing what at the end of twenty five-years would probably be the state of the fund, no charge is made on account of any repayments, though if refunding had been contemplated, it could not have escaped observation that the state of the fund might have been materially affected by it.

My opinion, therefore, on the effect of the despatch and regulations taken together is, that the amount to be contributed by the civil servants depends entirely upon the regulations, which are wholly silent as to refunding, and that all which the company has undertaken is, to make up the difference between the value * 428 of the annuity, * and the sums which under the first and eleventh regulation might have been contributed by the annuitant.

I do not think it necessary to advert in detail to what passed afterwards, as it has been fully referred to by my noble and learned friend. No doubt during some few years the original scheme was altered for the benefit of the servants, and the principle of refunding was to some extent sanctioned. But these were all temporary arrangements, and even if I could infer from the expressions in some of the despatches of the directors, written many years after the establishment of the fund, that they supposed refunding to have formed part of, or to be in accordance with, the original regulations, that was in my opinion a mere mistake, and ought not to have any influence in determining what is the true construction of the regulations themselves.

I therefore concur with the judgments in the Courts below, and I also concur with my noble and learned friend, in thinking that this appeal ought to be dismissed, and that there ought to be no costs.

LORD CHELMSFORD. — My Lords, the question raised by this appeal is whether Mr. Boldero, a retired civil servant of the East India Company, who had contributed annually to an annuity fund created for the purpose of providing annuities for the civil servants of the company in the Presidency of Bengal on their retirement from the service, is entitled to a refund of the excess of his contributions beyond the sum which he was bound to pay towards the purchase of the annuity to which he had become entitled.

The argument for the appellant was founded upon an alleged contract between the East India Company and * the * 429 company's civil servants, contained in a memorial of the civil servants to the company, and in a despatch of the directors in answer to the memorial, and also in the supposed admission by the directors of the principle of refund to be found in subsequent transactions and documents. It was properly stated by the respondents, that if the appellant could show that he was entitled to receive back the excess of his contributions to the annuity fund, in consequence either of an agreement with themselves or with the subscribers to the fund *inter se*, they would hold themselves responsible for the repayment. The only question, therefore, to be determined is, whether Mr. Boldero is entitled to the refund which he claims ?

Although the case occupied several days in argument, it lies in a very narrow compass. The contract is to be found (if at all) in three documents: first, the memorial of the civil servants to the Court of Directors of the East India Company of the 1st May, 1822; second, the regulations of the proposed annuity fund, and the alterations by the Court of Directors adopted by the civil servants; and third, the despatch from the Court of Directors of the 8th December, 1824.

The memorial referring to the establishment of an annuity fund in the Madras Presidency under the sanction and with the co-operation of the East India Company, prays, that the Court of Directors will grant an annual donation proportionate to that which they had granted to the Madras fund, and will issue instructions

for receiving in deposit the whole of the capital and subscriptions of the proposed fund from the trustees into the treasury, and will direct interest to be paid on all receipts and payments.

The regulations of the annuity fund, which were sanctioned by the directors, proved that the subscribers shall
 * 430 * contribute for the purposes of the fund 1-25th part of their salaries and all other public emoluments. That the affairs of the institution shall be managed by a committee of nine, four of whom shall be *ex officio*, and five shall be subscribers and elected at a general meeting. That the money and securities for money belonging to the fund in India shall be kept in the public treasury, subject to the direction and control of the trustees and managers of the fund. That the committee of managers shall be competent to decide in the first instance upon all matters relative to the receipts and disbursements of the fund, as well as generally upon all subjects connected with the management of the fund, and the due execution of the rules established for it. But the decision of the committee of managers shall be liable to revision and control by the resolution of the subscribers passed at a general meeting. That no decision upon any general questions involving any increase or diminution of the rate of contribution now fixed, or any essential addition to or alteration in the original rules and principles of the institution which are now established, shall be valid until sanctioned and approved by the Court of Directors.

In the despatch of the 8th December, 1824, which is the third and last of the documents in which it is alleged that the contract with the appellant and the other civil servants is contained, the directors express their approval of the scheme of an annuity fund, and their willingness to contribute to its augmentation. They observe that an annuity fund to be successful must derive material assistance from the company. That to establish a fund on such liberal principles as to insure its success as a measure highly beneficial to the whole service, the company's contribution should be proportionate to the contribution of the service. That as
 * 431 the efficiency and * utility of an annuity fund must materially depend upon the inducement offered by it to old servants to retire, they had come to the determination that the annuities shall not fall short of 10,000 rupees each, payable in England at the rate of 2s. the rupee, being 1000l. sterling, and that a civil servant shall not be eligible to accept an annuity unless he

has been actually in the service the period of twenty-five years. That in order to render the arrangement of important value to the service, they have resolved to fix the proportion of the purchase money to be paid by a subscriber to the fund at one half of the value of the annuity, according to a table calculated upon the principle of their allowing an interest of six per cent. upon all the balances of the fund.

The directors then proceed to explain the advantages to result from the establishment of this principle, and to state the means by which those advantages may be secured ; which they describe to be, first, by subscriptions from civil servants proportioned to their income ; secondly, contributions from the company ; under which head they say, " The company shall contribute whatever sum may be required in addition to the contributions of the subscribers, to enable the fund to grant such number of annuities as may be accepted under the prescribed regulations, not exceeding nine per annum " ; and that they had further resolved that an interest of six per cent. per annum be allowed on the funds set apart for the payment of annuities ; and, thirdly, fines from subscribers on becoming annuitants, which are explained to be " the difference between the accumulated value of a subscriber's contributions, and one half of the value of his annuity."

Upon these documents, so far as they have been referred to, there appears to be nothing to warrant the * notion of a * 482 contract having been entered into with the appellant to repay him the excess of his contributions beyond the half of the value of his annuity. The scheme of an annuity fund originated with the civil servants, and was proposed to be established for their mutual benefit, and they solicited the directors to grant them towards the objects of the fund " an annual donation." Beyond this donation, which was agreed to be made to the extent of one half of the value of the annuities to be granted to the civil servants upon retirement, and their becoming depositories of the funds set apart for the payment of the annuities, paying six per cent. upon the deposits, the company had nothing whatever to do with the management and appropriation of the funds, or with the internal government of the affairs of the institution. These were all conducted by the subscribers themselves, through a committee of managers. The contributions to the fund were paid into the treasury, subject to the control and direction of the trustees and

managers, and the application of the fund according to the regulations, rested entirely with them. There is nothing in the general character of the arrangements, from which it can be inferred that the subscribers contributing to the fund were to have any refund of what they had paid beyond the half value of the annuity. They were required to pay the four per cent. as long as they continued in the service. If the company had declined to contribute any donation to the annuity fund, the subscribers must have had to provide the whole value of the annuity, which would probably in most cases (if not in all) have required an additional sum larger than the excess which has arisen from the limitation of their contributions to the half value.

Nor is there any great hardship upon the subscribers in denying them the return which they claim. It certainly
 * 433 * might happen (though probably the instances would be very rare), that a subscriber might have paid more than the half value before he was entitled, from length of service, to receive an annuity; but it may be assumed that in general this would not be the case. If, therefore, a civil servant after having served twenty-five years chose not to retire, he must be taken to have balanced the advantages arising from his continuance in the service, in receipt of his salary, against the loss of four per cent., which he is compelled to contribute out of that salary to the annuity fund, into which it is absorbed.

But it is contended on the part of the appellant, that the documents establish not indirectly and inferentially, but expressly and directly, a contract that the civil servants shall have a return of the excess of their contributions to the annuity fund. It is admitted that the civil servants are obliged to contribute to the fund four per cent. of their salaries, as long as they remain in the service, and that there is nothing in the regulations of the fund, constituting the subscribers' agreement *inter se*, which points to a refund under any circumstances. But it is said that in the despatch of the 8th of December, 1824, there is to be found clear and unequivocal language amounting to an express and positive contract that the subscribers shall receive back all that they may have paid beyond the half value of their annuity. For this purpose reference is made to the 52d paragraph of the despatch, where the directors say that they "consider it of essential importance that so far as may be practicable, the advantages afforded by the fund

should be available by those eligible to receive them upon terms of strict equality." And the 57th paragraph, which, referring to what had first been stated with regard to the amount which a civil servant at the expiration of twenty-five years' service, and at the age of * forty-five, would have to pay for an annuity, * 434 observes: "But although in the mode here proposed, all servants becoming annuitants will pay half the value of their respective annuities, and no more; and will so far be placed upon an equal footing," &c. These expressions, the learned counsel for the appellant assert, are conclusive and irresistible proof that the intention was that the subscribers were to be on a footing of strict equality, and that each subscriber was to pay one half of his annuity, and no more; and they ask how it can be said that the subscribers are on a footing of equality, if of two persons of the same age, one has to pay for his annuity one half, and the other not only the half, but all his contributions beyond the amount of the half value? And how a civil servant becoming an annuitant pays half the value of his annuity, and "no more," when he has to pay not only the half value, but the whole of his contributions to the fund, however much these may exceed the amount required for the purchase of an annuity.

This argument was urged at the bar with great force and earnestness, but it will not bear examination. The despatch of the 8th December, 1824, has nothing whatever of the character of a contract which the directors were entering into with the civil servants. It is a mere signification of their approbation of the scheme of the annuity fund for the benefit of their servants, and of their willingness to promote it by a donation from their own funds, with a detailed description of the advantages likely to result from such a fund, and a suggestion of the points which ought to be regarded in its establishment. In the course of these suggestions they say, "The third point requiring attention, is the proportion of the value of the annuity which should be paid by the annuitants." On which point they observe that they "consider it of *essential importance that, so far as may be * 435 practicable, the advantages afforded by the fund should be available by those eligible to receive them, on terms of strict equality." It is difficult to understand how the suggestion contained in the passage can be converted into a contract. But supposing it to amount to a contract, how does the equality con-

templated involve in it a refund of the excess of contributions? The equality which the company here have in view, is "in the proportion of the value of the annuity which should be paid by the annuitants." This equality, they say, if the annuitants were of the same age, would be in a great degree accomplished by fixing an aggregate sum as the purchase money for the annuity, "but" (they add) "as the ages of the annuitants must naturally vary, it follows that to maintain strict equality, the amount of the purchase money should depend upon the value of the annuity, which of course is regulated by the age of the annuitants." What possible ground is there for contending that in this suggestion of a mode of arriving at an equality by making the annuitants pay (though necessarily unequal amounts, yet) in each case only one half of the annuity, that the company had in contemplation the contributions previously made by the subscribers to the annuity fund, and intended to produce a different kind of equality from that which they expressed, by providing for a return to the annuitants, of all sums contributed beyond what was required for the purchase of their annuities.

The words of paragraph 57 appear, if possible, to be less capable of the effect which the appellant would ascribe to them. The directors had, in paragraph 55, expressed their resolution to fix the proportion of the purchase money at one half the value of the annuity, according to a table subjoined, and had shown in *436 paragraph *56, what, upon the assumed calculations, a civil servant at the expiration of twenty-five years' service and at the age of forty-five would have to pay. And then they add, in paragraph 57, the words relied upon: "But although in the mode here proposed, all servants becoming annuitants will pay half the value of their respective annuities, and no more, and will so far be placed upon an equal footing," &c. Now is it not evident that this is a mere statement of the necessary result of the previous calculations, and that it can bind the company to nothing? And even taking the words (as I did in the consideration of paragraph 52) to amount to a contract, how are the annuitants proposed to be placed on an equal footing, except by each of them paying only one half of the value of the annuity, whatever the amount of that one half may be? These paragraphs, 55, 56, and 57, in fact only explain the mode in which the "strict equality" in the proportion of the value of the annuity to be paid by the

annuitants suggested in paragraphs 52 and 53, can be carried out.

It thus appears that the words "strict equality" in paragraph 52, and "half the value of the respective annuities, and no more," in paragraph 57, which are principally relied upon as establishing the right of the appellant to a refund of the excess of his contributions to the annuity fund, over the half value of his annuity, do not touch that question. Nor have I been able to discover any thing in the documents which constitute the supposed contract to indicate the least intention, that the subscribers should receive back any part of the four per cent. upon their salaries, the payment of which was the condition of their becoming entitled to their annuities. There are, indeed, passages which apparently point in an opposite direction. I will advert only to one of them.

* It appears that the directors contemplated the probability that the fund might increase to an extent to render it unnecessary for them to continue to assist it to the extent of half the value of the annuities. And in their despatch of the 8th December, 1824, they insert a prospective calculation of the receipts and disbursements of the fund, showing, at the end of the twenty-fifth year, an expected total income exceeding the value of nine annuities upon lives of forty-five. With this expectation the directors, by the 62d paragraph of their despatch, desire that the funds be annually credited with a sum equal to the amount yielded within the year by the subscription of four per cent. on the official incomes of the subscribers, and that the treasury should receive deposits, and allow interest at six per cent. per annum, to be computed annually upon the balance belonging to the fund. They also desire, that if at the end of five years the balance should be less than the amount apparent in the prospective calculation, the fund be credited with the amount of the deficiency; that if on the other hand the balance shall exceed the balance so calculated, then an annual deduction equal to the income derived from the excess of balance shall be made, either from the company's contribution or from the rate of interest allowed on the accumulations of the fund, at the option of the Court of Directors. They then provide for similar adjustments every five years, and for a final limitation of the company's contribution at the end of twenty-five years, to a sum which, added to the contributions of subscribers, and to the income derived from the accumulated balance, would make a total

income equal to the grant of nine annuities annually. Now what was the fund from which this accumulated balance was to arise ?

It was to consist of the four per cent. of the subscribers,
 * 438 of the equivalent annual * contribution of the company,
 and of the six per cent. upon the capital of the fund. No distinction is made between the different parts of this fund, but it is treated as a whole, and the company is to have the benefit of the income of the entire accumulated balance added to the contributions of subscribers, in reduction of its own contribution.

That this was the intention of the directors, appears from what occurred upon the temporary arrangement, which was in operation from 1836 to 1840. In the year 1835, the application for annuities had, for some reason or other, fallen short of the annual number proposed in the original scheme ; and the balance of the annuity fund had increased far beyond what was expected at the time of its institution. In consequence, a memorial was presented by the civil servants to the directors, praying that such modifications might be made in the regulations of the annuity fund as would enable it to apply to unappropriated annuities. In answer the directors say, " Towards the accomplishment of that object, we are prepared to suspend, for the present, any deduction from our contribution or from the rate of interest allowed on the accumulations of the fund, for which provision is made in the 62d paragraph of our letter of 8th December, 1824."

It is unnecessary to dwell at any length upon the regulation which was made at this time, by which, for a period of four years, the annuitants had the benefit of a return of the excess of their contributions ; but some expressions contained in the despatches of the directors on this subject, having been supposed to amount to admissions of the right of the civil servants to the refund which the appellant claims, it is necessary that they should be shortly noticed. The regulation which was proposed to the subscri-

* 439 bers, * and adopted by them, was, that " at the close of every year the number of unaccepted annuities be publicly declared, and two thirds of them be appropriable to subscribers, upon payment of one fourth instead of one half of the value of the annuity ; and that in the event of the accumulated subscriptions, with interest, exceeding the said one fourth, the balance, with interest, to be returned to the subscribers. The remaining one third of the annuities, together with such of the two thirds as shall

be claimed within the period of three years of the time of declaring the surplus, shall lapse to the fund." This regulation, which was evidently proposed in order to meet an unexpected state of things, and to hold out a strong inducement to the senior civil servants to retire from the service, if it has any effect upon the question at issue, seems to me to be rather against, than in favour of, the appellant. If, according to the argument of his counsel, the principle of refund was clearly contained in the original contract, and by the temporary arrangement it was merely intended that the subscribers should contribute one fourth instead of one half of the value of the annuity, this might have been said in very few words, and all the rest of the agreement between the parties would have been left upon the same footing as before.

The experiment thus made was not considered to have been satisfactory by the civil servants, and they presented a memorial to the directors, of the date of 1st January, 1888, in which they solicit from the directors that they will permit "the fund to grant annuities not exceeding nine in number, to the extent of the annual fixed income of the fund, from subscriptions, your donation, and interest on the fixed capital, under the condition of requiring the retiring servants to make good to the extent of a quarter of the value of their annuities, receiving no * refund of * 440 any excess in the amount of their subscriptions, in case these should at the time of the retirement, with interest, exceed the quarter value of the annuity taken."

From the terms of this memorial, it is hardly possible to suppose that the civil servants considered that refund of the excess of subscriptions was any part of the original regulations of the fund. But it was said on behalf of the appellant, that the despatch from the directors of the 1st September, 1841, in reply to the memorial, shows that this must have been the case. In the 2d paragraph of that despatch, the directors say, "With respect to refund of subscriptions, we are disposed to meet the views of the majority of the subscribers, to the extent of confining refund to the excess which may have been paid beyond the half value of the annuity, such an arrangement being in accordance with the regulations of the fund." This was urged by the appellant as an admission by the directors, that under the original regulations the annuitants were entitled to a refund of their subscriptions beyond the half value of their annuity.

But this does not appear to me to be the correct meaning of this

passage, although I admit that it is not free from ambiguity. By what has been called the temporary arrangement, the subscribers to the annuity fund had been permitted to obtain annuities upon payment of one fourth instead of one half of the value, and to have a return of the excess of their subscriptions beyond the one fourth, the company being willing to suspend for a time any deduction from their contribution on the rate of interest allowed by them on the accumulations of the fund. The civil servants submit to the company that the refund of excess subscriptions ought not to stand as any permanent rule of the institution, and solicit the directors that they will permit the fund to grant annuities

* 441 under the condition * of requiring retiring servants to make good to the extent of a quarter of the value of their annuities, receiving no refund of any excess beyond the quarter value. To which the directors answer, "We are disposed to meet the views of the subscribers to a certain extent" (not by denying the principle of refund altogether but) "by confining it to the excess beyond the half value of the annuity, such an arrangement being in accordance with the regulations of the fund," which regulations (it must be borne in mind) required the subscribers to contribute one half instead of one fourth. The effect of this would have been that although the subscriptions of the annuitants were to be applicable towards the purchase of annuities at a quarter value, yet that there was to be no return of the difference between this amount and the half value which they were compelled to contribute under the original regulations.

And this is made perfectly clear by the table illustrative of the order of the 1st September, 1841, which was not before the Master of the Rolls nor the Lord Chancellor, but which was agreed by both parties to be put in evidence before your Lordships in which the case of nine annuitants is stated, amongst whom the income of the year, amounting to 82,012 rupees, is equally divided to improve their balances to meet the fine, but as to one of whom the application of his equal share amounting to 9112 rupees, would leave an excess the half value of the annuity of Rs. 2856. 6. 8. The note to the table states that "as the orders of the Honourable Court do not allow of refunds except in the case of an excess of subscriptions beyond half value, this amount will remain to improve the terms of the other eight portions." The arrangement thus proposed is unnecessary to be further considered as

* it was not adopted by the subscribers to the fund, the *442 requisite majority of votes according to the regulations not being recorded in its favour.

It is thus apparent that the directors never agreed originally, nor did they afterwards admit any agreement, to the effect that the refund of the excess of subscriptions beyond the half value of the annuity was any part of the regulations for the institution of the annuity fund. And that the subscribers amongst themselves never bound themselves to any such refund, is strongly asserted in a letter from the secretary to the fund, to the secretary to the Government of India dated the 10th of March, 1843, in which he says, "The managers beg to deny that refunds of excess subscriptions above any valuation were ever contemplated under the original constitution of the fund. It was originally and is now the constitutional principle of the fund that subscribers shall contribute during the whole period of their service, and shall not obtain any refund of excess subscription."

After this full examination of the case it is scarcely necessary to notice the case of *Blunt v. Halliday* before the Supreme Court of Bengal, in which it was held that a claim by one of the civil servants, similar to the one now made by the appellant, could not be supported. The two cases of *Davis v. The Trustees of the Madras Civil Service*, and *Robertson v. East India Company* in the Supreme Court of Judicature at Madras, the latter case having been brought by appeal to the Privy Council,¹ were decided upon special circumstances connected with the Madras annuity fund, circumstances which do not exist in the present case.

* I am clearly of opinion that the appellant has no right *443 to a refund of the excess of his contributions to the annuity fund beyond the half value of his annuity, and that the decree appealed from ought to be affirmed and the appeal dismissed. I agree with my two noble and learned friends that there should be no costs.

Decree affirmed, and appeal dismissed.

Lords' Journals, 30th March, 1865.

¹ 12 Moore, P. C. 400.

MERSEY DOCKS v. CAMERON, AND JONES v. MERSEY DOCKS.

1864. February 18, 19, 22, 23; July 7. 1865. June 22.

"The MERSEY DOCKS and HARBOUR BOARD"	}	<i>Plaintiffs in Error.</i>
TRUSTEES,		
WILLIAM CAMERON and Others,		<i>Defendants in Error.</i>
JONES and Others,		<i>Plaintiffs in Error.</i>
"The MERSEY DOCKS and HARBOUR BOARD"	}	<i>Defendants in Error.¹</i>
TRUSTEES,		

Poor Rate. Property. Occupation. Public Purposes. 43 Eliz. c. 2.

The Crown not being named in the 43 Eliz. c. 2, is not bound by its enactments. Property therefore in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.

The statute is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions, all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works.

Trustees who were constituted by Acts of Parliament, "The Mersey Docks Board," and were specially appointed to have the control of certain docks, &c. vested in them as such trustees, in order to maintain these docks for the benefit of the shipping frequenting the port of Liverpool, were therefore held liable to be rated as occupiers, though they occupied such docks, &c. only for the purposes of these Acts and derived no benefit from the occupation.

The King v. The Commissioners of the Salter's Load Sluice, 4 T. R. 730; and *The King v. Liverpool*, 7 B. & C. 61, overruled.

Recent Acts expressly declared that certain warehouses and parts of the docks, then for the first time erected and put under the control of the trustees, were to be liable to rates.

Per LORD CHELMSFORD. — These Acts did not by implication declare that the other parts of the docks were not liable to rates.

¹ *Mersey Docks Trustees v. Gibbs*, Law Rep. 1 H. L. 94; *Leith Harbour Commissioners v. Inspectors of the Poor*, Law Rep. 1 H. L. Sc. 17; *Greig v. University of Edinburgh*, Law Rep. 1 H. L. Sc. 350 – 355; *Attorney-General v. Dakin*, Law Rep. 4 H. L. 360.

In each of these cases trustees constituting the "Mersey Docks and Harbour Board" had brought in the Court of Common Pleas an action of replevin, to try the question of their liability to a rate for the relief of the poor.

Jones and others were the church-wardens and overseers of the town and parish of Liverpool, and had levied a poor's rate assessed at 20,580*l.* 18*s.* 8*d.* as the amount payable by the dock trustees in respect of the dock estates within the parish of Liverpool. A special case was agreed on, which set forth, in substance, the following facts: The dock estates in the parish of Liverpool were, by different Acts of Parliament, vested in the mayor, aldermen, and common council of the borough of Liverpool, as trustees of the docks and harbour of that town. Part of these estates had been granted by the corporation, part sold by the corporation to the trustees, and part purchased by the trustees from private individuals. These Acts of Parliament were twenty-two in number, and extended from the 8th Anne to the 21st Vict., both inclusive. The case gave both parties leave to refer to them. The dock estates consist of docks, basins, &c., and the trustees are by several Acts of Parliament authorised to receive dock rates and duties in respect of the accommodation of vessels in the docks. By the 20 & 21 Vict. c. 162, * (local and personal,) "An *445 Act for consolidating the Docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust all the docks and other real property situated at Liverpool," that were held by or in trust for the trustees of the Liverpool Docks, were vested in the plaintiffs, to whom the name of "The Mersey Docks and Harbour Board" was given, subject to all charges and liabilities affecting the same. The plaintiffs were to stand possessed of all the property, privileges, &c. "upon the trusts, and for the purposes for which such property, privileges, &c. were holden previously to the commencement of the Act." The rules with respect to the moneys received under the Act had for their object the convenience and safety of shipping frequenting the port of Liverpool, which general purpose had been expressly declared in all the Acts. The 59th section of this Act enacted that, "The board shall render to Parliament, as soon as may be after the 24th day of June in every year, an account of its receipts during the preceding year, and the manner in which the same have been applied."

The board was bound to apply all the moneys received in the manner and for the purposes provided by these various Acts, and the case stated that "no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock estate." All the revenue derived from any of the property is carried to the account of the general dock estate, and is appropriated and applied as directed by the Acts.

By the 4 Vict. c. 30, § 52, the trustees were empowered to build warehouses on the quays of one of the docks (a power by the 11 Vict. c. 30, § 3, extended to all the dock quays), and by section 71 of the first-mentioned Act, and section 4 of the *446 second-mentioned Act, * such warehouses were expressly made subject to all parochial and other rates.¹ None of the warehouses built in pursuance of these Acts is included in the assessment, the subject of this proceeding.

The question for the opinion of the Court was, whether the Mersey Docks and Harbour Board Trustees were rateable to the relief of the poor in respect of property in the parish of Liverpool other than that included in the two last-mentioned Acts? The Court of Common Pleas in the case of Jones gave judgment in favour of the Mersey Dock Trustees, in conformity with the case of *The King v. The Inhabitants of Liverpool*.²

In the case of Cameron, which related to a rate levied on the trustees in respect of property within the parish of Birkenhead, the question of liability to rate was likewise discussed, but another point was also raised, namely, whether an action of replevin was maintainable. The Court, on this second point, thought that there ought to be judgment for the defendants, on the ground that the plaintiffs ought to have appealed against the rate to the sessions, and ought not to have left it unappealed against, and then contested its enforcement by an action of replevin.³ Appeals in the two cases were then brought. The Judges were summoned, and

¹ In *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, A. D. 1827, the Court of King's Bench had held that the Liverpool Docks were not rateable to the relief of the poor, on the ground that the Acts for creating the docks had directed how the money received for their use should be applied, namely, in manufacturing the docks, and if there was any surplus, the dock dues were to be lowered accordingly, "and to no other purpose or use whatsoever."

² 7 B. & C. 61.

³ *Mersey Docks v. Jones*, 30 Law J., N. S., M. C. 185; 8 C. B. N. S. 114; *Mersey Docks v. Cameron*, 30 Law J., N. S., M. C. 194.

Lord Chief Baron Pollock, Mr. Justice Williams, Mr. Justice Byles, Mr. Justice Blackburn, Mr. Justice Mellor, and Mr. Baron Pigott attended.

* *Mr. Bovill* and *Mr. Mellish* (*Mr. Crompton Hutton* was *447 with them), for the overseers in support of the rate.— The simple question in this case is what is the construction that ought to be put upon the Statute 43 Eliz. c. 2? The decisions on it are numerous, and have not been very consistent. Exceptions to its provisions have been introduced, which it is submitted are not warranted on principle; and the object of these appeals is to obtain a definitive declaration of the principle on which that statute is to be construed.

The words of the statute are simple—they give no other test of liability to rate except occupancy. They direct the overseers “to raise by taxation of every inhabitant and of every occupier of lands, houses, &c. in the said parish,” the money required. It has been supposed that the occupation thus rendered liable must be one beneficial to the occupier, and consequently that where a corporation occupied for what were deemed public purposes, and the members of the corporation received no individual benefit from such occupation, they were not rateable. That is an erroneous view of the intention of the statute. Tolls received from the use of a ferry were held not rateable, because the receiver of them was not an inhabitant of the parish, *The King v. Nicholson*; ¹ though it was clear that he was an occupier of the land from the use of which as a landing place the tolls were derived. Again, where there was no payment made for the use of the seats in a Quakers’ meeting-house, it was held that no rate could be imposed on the trustees, *The King v. Woodward*.² None of these cases adopted a true principle. The purpose for which the building in this last case was applied could * have nothing to do with the *448 matter, for in *The King v. Agar*,³ though the building was equally one used for religious worship, the rate was held good on the ground that pew rents were received by the trustees. And in *The King v. Hurdie*,⁴ there being an actual occupation, though the place occupied was a lodging in a battery by a gunner, who was removeable at pleasure, the Court held that the fact of his being an occupier made him rateable.

¹ 12 East, 330. ² 5 T. R. 79. ³ 14 East, 256. ⁴ 3 T. R. 497.

The only case in which exemption from rateability can be claimed is that where the land is occupied by the Crown itself, or in the direct service of the Crown; and if the purpose of the occupation is to be taken into consideration at all, it can only be so where the purpose of the occupation is for the benefit, not of a portion of the public, but of the public at large; and this distinction is referred to and recognised in *Adamson v. The Clyde Navigation Trustees*,¹ *The Queen v. Badcock*,² *The Queen v. Longwood*,³ *The Queen v. Harrogate*.⁴ An occupation of land in one parish for the benefit of the poor of another, renders the occupation rateable in the parish where the land lies, *The Governors of the Poor of Bristol v. Wait*.⁵ The idea that occupation for public purposes afforded a ground of exemption, took its rise from the marginal note in *Salters' Load Sluice Case*; ⁶ but the judgment there shows that, as the commissioners were "mere trustees to superintend the * 449 execution of the * Act," they could not be deemed occupiers, and as there was no occupation, there was no rateability. The note and the judgment do not agree together; but even on the ground stated in the judgment itself, it is submitted that the case cannot be supported. Trustees are occupiers, though they may not occupy for their own benefit. In *The King v. The Trustees of the Weaver Navigation*,⁷ the rate was only held bad (occupation in certain parishes being assumed to be established), because the surplus tolls were expressly appropriated by the Act to the repairing of the county roads and bridges, which were deemed to be purely public purposes.

The application, under the direction of a statute, of all the funds derivable from the occupation of a particular property to the maintenance of that property, for purposes which confer no individual benefit on the trustees, and which are therefore called, but wrongly called, public purposes, affords no ground for exemption from rateability, *The Tyne Commissioners v. Chirton*.⁸ There the commissioners of the Tyne Docks were held rateable, the occupation there producing a benefit, not to the public generally, but

¹ Not reported.

² 13 Q. B. 116.

³ 5 A. & E. 1.

⁴ 6 Q. B. 787.

⁵ 15 Q. B. 1012.

⁶ 4 T. R. 730. The marginal note is, "By an Act of Parliament, the commissioners of a navigation were authorised to take certain tolls, the whole of which were directed to be applied to public purposes: Held, that the tolls were not rateable to the poor."

⁷ 7 B. & C. 70, n. (c).

⁸ 1 Ellis & E. 516.

only to a particular section of the public ; and there being nothing in the Acts for creating the docks, which excluded any possible surplus obtained by the dock dues from the payment of the poor rates. In the previous case of *The Trustees of the Birkenhead Docks*,¹ it had been decided that though all sums received for dues were to be applied to the purposes of the Dock Act, still, as it did not appear that the dues were to be kept down so as to meet those purposes only, it could not be considered that the Legislature had disposed of all the dues to purposes other than the poor rate, or that the poor * rate might not properly be paid * 450 before appropriating the money to those purposes. The tendency, therefore, of the later decisions has been to exclude claims of exemption, unless where they are established by legislative authority.

The case of *The King v. The Inhabitants of Liverpool*,² decided in 1827, is that which will be most relied on by the other side. There the trustees of the docks were held not to be rateable, because, not only were the dues, when received, directed by the Act, to be applied in making and maintaining the docks, but they were to be lowered when possible, and no individual trustee had any beneficial occupation of the docks. It is submitted that that case cannot, even on the assumed doctrine of public purposes, be supported. That decision proceeded partly on words to be found in the Act 51 Geo. 3, c. 143, which specifically directed how the dock dues were to be applied, and which Lord Tenterden treated as equivalent to the words in the *Salter's Load Sluice Case*, "and to no other use or purpose whatsoever." But even if those words themselves had existed in that Act, they could not have justified the decision. They would mean that the dues were not to be applied to purposes other than those of maintaining the docks, but they would not exclude the payment of those charges which the general law of the land had fixed upon all property. The mistake was in supposing that they had this excluding effect.

In *The Queen v. The Trustees of the River Lea*,³ there were several Acts of Parliament. The first had stated the objects of the trust, and contained a clause expressly prohibiting the funds from being applied to * any other object ; and also a clause * 451 declaring that they were not to be liable to any tax, assessment, &c. whatever. While the latter words were unrepealed, the

¹ 2 Ellis & B. 148.

² 7 B. & C. 61.

³ 19 Justice of the Peace, 310.

funds were of course exempt; but, when a subsequent Act repealed them, though the former words still continued, the tolls received were held liable to rate. It may now be considered as established, that nothing but an express legislative exemption from liability to rate can authorise that exemption; it certainly cannot be implied from words which merely direct that the funds shall only be applied to particular purposes, for that direction has nothing to do with the payment of legal charges to which the property is subject. In the Acts relating to these docks there is no such direct exemption, and, consequently, none can be claimed. It will be argued, that as some of the recent Acts affecting the docks have declared that the new buildings authorised by them to be erected shall be liable to be rated, it must be assumed that the Legislature recognized that they would not have been so liable but for such a declaration. There is no ground for such an argument. The declaration in these Acts simply prevented the possibility of any question arising as to the liability to rate of the warehouses then authorised to be erected, but had no effect on any thing that had gone before; it left untouched the question as to what was the general law as to the old buildings. It is submitted that they were liable. The enactment in the Statute of Elizabeth is universal in its terms; no subsequent Act of Parliament has introduced an express exemption as to any property (however it may be occupied), and there being no such express exemption, none can be implied. One statute cannot repeal the provisions of another unless there is an express contradic-

* 452 tion between them, * Dwaris on Statutes;¹ *Middleton v. Crofts*,² *Mahony v. Wright*,³ *The London and Blackwall Railway Company v. The Limehouse District*.⁴

The effect of holding these docks not to be rateable would be extensive and disastrous. For some years past the Legislature has taken matters of this kind out of the hands of joint-stock companies, and placed them in those of public trustees. This has been so as to sanitary matters in towns, and with regard to gas works, and to water works, *Mayor of Liverpool v. Overseers of West Derby*.⁵ Are all the extensive occupations of such trustees to be free from liability to poor's rate? Such exemptions could never have been

¹ Pages 478, 474.

² 2 Atk. 650.

³ 10 Irish Law, N. S. 420.

⁴ 3 Kay & J. 123.

⁵ 6 Ellis & B. 704.

foreseen at the time of the Statute of Elizabeth, and have never been suggested by any provisions or even phrases in modern Acts of Parliament.

Sir F. Kelly and *Mr. Quain* (*Mr. Parker* was with them), for the Mersey Docks trustees. — Upon the true construction of the Statute of Elizabeth, for the assessment of property in occupancy there must be a real occupancy; and that occupancy must be beneficial. If the occupancy is one for public purposes alone it is not within the Act. To be within the Act, it must be attended with some profit to the occupier. Where the object is purely one of charity, *The King v. St. Luke's Hospital*,¹ *The King v. St. Bartholomew's-the-less*,² or for what may be termed religious purposes, unattended with profit of any kind to the occupier, it is not exempt * from (for that is, in such a case, a misap- * 453 plied term), but is not within the Statute of Elizabeth. So, where the occupation is as of public property, applicable to public purposes, that is, where the benefit is not confined to an individual locality, or limited to a small defined body of persons, but results to all who need to avail themselves of it, the property is not rateable. So the question stands upon principle; how does it stand upon authority?

The authorities, when properly considered, are not conflicting. The cases of the first class related to charitable purposes. When those purposes were universal they were not within the statute; when they benefited only a limited class of persons they were. Thus considered, *The Queen v. Badcock** is really in favour of the dock trustees. That case may be treated as laying down this doctrine, that, where property is occupied by persons who are clothed with a public character, having public duties to discharge, and discharging them without a salary, and without the capacity to apply any portion of the property to their own use, or to any use except that provided for by the law, purposes from which the whole public may derive a benefit, such an occupation is not rateable. It was there made rateable only because the benefit was confined to a small definite body of persons, and not given to the public generally. The trust here comes within the general not the restricted description. Shelter is to be afforded to all vessels coming into or going out of the port of Liverpool. That is a great

¹ 2 Burr. 1053.

² 4 Burr. 2435.

* 6 Q. B. 787.

public purpose. It is true that some of the persons who receive this benefit may be appointed members to constitute the board which provides it; some being nominated by the commissioners of the docks at Liverpool, or by the Liverpool * Corporation, or by the Commissioners of Public Works, and the rest by the rate-payers; but they are not thereby made occupiers for their own benefit; they are the agents of all the commercial men of the world. It is not, therefore, a benefit confined to a portion of the public, but is a benefit secured to the public at large, and has all the characteristics of a national matter. The mode of making the payments cannot affect the question: the money is, of course, received from those who use the docks, but is received for and applied to public purposes alone. If a joint-stock company had built the docks, a profit on the outlay would have been required for the shareholders; the trade of the country must have been taxed to that extent. No such profit can be made here, and its amount, therefore, is so much saved to the general shipping of the world. This is a public gain, one which operates for the advantage of the whole community.

It is true that the words of the Statute of Elizabeth are general, but what were the circumstances of the times when that statute was passed? Every thing was then in the hands of the Crown or of individuals; there were no public trustees appointed to execute works for the public advantage, and receiving no emolument therefrom for themselves. But there were cases in which individuals gave up their own property to charitable purposes: and in such cases the property so employed was held not rateable. In *Earby's Case*¹ it was held that the taxation for the poor must be on the occupier according to his visible estate when the tax was imposed. Dalton's Country Justice² is to the same effect. The cases distinctly establish the rule that there may be an occupation which, if not beneficial to the person who occupies, his occupation * 455 * being only for a public or a charitable purpose, he shall not be rateable. In *The King v. St. Thomas in Southwark*,³ a preacher was rated as the occupier of the meeting-house where he preached: it was proved that he made no profit from his occupation, and he was held not to be rateable; rating him merely as occupier being held to be too uncertain. An Anonymous case in 1727⁴ was even stronger; there a rated house had been con-

¹ 2 Bulstr. 354. ² Tit. Poor, 48. ³ 2 Str. 745. ⁴ 16 Vin. Abr. tit. Poor (E), 5.

verted into a conventicle, and was rated as before ; the rate was quashed because no profit was made of it. The same rule was adopted in *Robson v. Hyde*.¹ Then came the cases of *St. Luke's Hospital*,² and *The King v. St. Bartholomew's Hospital*,³ where not the governor, the servants, nor the poor who received the benefits of the hospital were held rateable ; yet the governor at least was in the actual occupation of the property.

On the other hand, in *The King v. Gardner*,⁴ where Catherine Hall Cambridge was seized of property from which the corporation of that establishment did derive a profit, it was held rateable. But in *The King v. Waldo*,⁵ the result was different ; there the plaintiff was the owner of a house which he devoted to the education of poor girls ; he put a person into the house to act as their instructress. As he made no profit from it he was held not rateable. *The King v. Field*⁶ is to the same effect. Where profit is made from the occupation even of the property of the Crown, such occupation may be made the subject of a rate ; *Lord Bute v. Grindall* ;⁷ where the plaintiff was the ranger of Richmond Park, and was held liable to be rated in respect of his occupation of the Crown property. * But in *Lord Amherst v. Lord Sommers*,⁸ the colonel of a regiment rented stables by order of the Crown for the use of the regiment, but did not put his own horses there ; and he was held not to be rateable. There Mr. Justice Ashhurst said, that " neither the possessions of the Crown nor of the public are liable to be rated to the poor." That case occurred four years before the *Salter's Load Shuice Case*, and consequently it cannot be truly said that the marginal note in the latter case created the doctrine as to the non-liability of property used for the purposes of the public.

It was the fact of an actual occupation, and a fact too, that the occupation was a profitable one, which explains the decision in *The Governors of the Poor of Bristol v. Wait*.⁹ *The King v. Hurd*¹⁰ did not decide any point of law, but proceeded on the actual finding of the sessions, which had not been impeached, that there was a beneficial occupation. In *Eckersall v. Briggs*,¹¹ the distinction before referred to was again established ; the owner of certain

¹ Cald. 310.² 2 Burr. 1058.³ 4 Burr. 2435.⁴ Cowp. 79.⁵ Cald. 358.⁶ 5 T. R. 587.⁷ 1 T. R. 336, 2 H. Bl. 265.⁸ 2 T. R. 372.⁹ 5 A. & E. 1.¹⁰ 3 T. R. 497.¹¹ 4 T. R. 6.

stables used by the colonel of a regiment for his men, was held to be rateable, but this was under the words of a particular Act of Parliament. The discussion in *The King v. The Mayor of London*¹ shows that what is supposed to have been established by the *Taunton Market Case*,² namely, that it must be a general public purpose and not one of a limited kind, was established long before then. What was the *Salter's Load Shuice Case*?³ The tolls there collected were ordered to be applied to public purposes; at that time it was thought that tolls were subject to rate, but * 457 there was * held to be no such occupation in that case as to create liability to rate. Nor is there any such occupation here. And therefore it is that the liability to rate in this case is not to be sustained.

In *The King v. Parrot*,⁴ the occupier of a coal mine was held rateable, though the mine was actually at that time worked at a loss, for it was a beneficial occupation, and might often be profitable, and such an occupation was declared to be the proper test of liability. But in *Holford v. Copeland*,⁵ the chambers of a Master in Chancery were held not rateable, because he had not a beneficial occupation of them. The same rule has been applied with, of course, a different result, to apartments in barracks, where the occupation has not been that which an officer was compelled to have for the performance of his duty, but has been one of a beneficial kind; *The King v. Terrott*.⁶ So the case of *The King v. The Governor and Company of the New River*⁷ was held to be one of beneficial occupation, on account of the profits derived therefrom, and the rate was good.

It has been asserted that the case of *The King v. The Inhabitants of Liverpool* in 1827,⁸ had created surprise in the profession; but that observation is hardly justifiable, for it is in exact accordance with, and was followed some time afterwards by the decision in *The Queen v. The Mayor and Aldermen of Liverpool*,⁹ where it was held that as the Municipal Corporation Act had, by section 92, appropriated all the corporate funds to purposes of a public nature, the rateability of the corporation in respect of town and anchorage dues had ceased. And though Mr. Justice Crompton, in

¹ 4 T. R. 21.⁴ 5 T. R. 593.⁷ 1 M. & S. 503.² *The Queen v. Badcock*,⁵ 3 Bos. & P. 129.⁶ 7 B. & C. 61.³ Q. B. 787.⁸ 3 East, 506.⁹ 9 A. & E. 435.⁴ 4 T. R. 780.

*The Tyne * Commissioners v. Chirton*,¹ said that *The King* *458 v. *Liverpool* had created surprise in the profession, he distinctly added that it had been adopted as law, and showed that in the *Birkenhead Case*² it was not controverted. The case of the *Weaver Navigation Trustees*³ was another instance where property applied to public purposes was treated as not liable to be rated.

The present case is identical with that of the *Salter's Load Sluice Case*;⁴ there tolls were in question which were deemed rateable; but there was no beneficial occupation. There can be no doubt that for a very long period it has been well established, that property occupied for public purposes alone, and from the occupation of which no individual derives a profit, is not rateable. In *The King v. Harrogate*,⁵ Lord Campbell, who was supposed to have brought this principle into doubt, never said any thing in opposition to the *Salter's Load Case*, nor to the *Liverpool Case* of 1827, but actually confirmed them by saying, "You have to show that all the purposes to which the money was applied are public"; which was itself a recognition of the preceding cases, and of the principle, that if the purposes were public there was no rateability. In *The Queen v. The Commissioners for lighting Beverley*,⁶ the commissioners were held not to be beneficial occupiers of the gas works, because all the profits were to be applied as the Act directed; in other words, to public purposes.

The *Birkenhead Dock Case*⁷ cannot be supported. It rests entirely on the assumption that all occupation must be beneficial, and that the whole doctrine of public * purposes arose *459 from an error in the marginal note of the *Salter's Load Sluice Case*. In both respects that is wrong. If the *Birkenhead Case* cannot be supported, the two cases *Trustees of the River Lea*,⁸ and *Tyne Commissioners v. Chirton*⁹ which followed it, must fall with it. As to the *Clyde Case*¹⁰ it depended on the words of a Scotch Act, and the Judges found that in fact the trustees of the navigation were owners of the property, and as such liable in the very words of the Act. But there the general doctrine of non-liability on account of public property could not be denied; and though in the

¹ 28 Law J., N. S., M. C. 131, 1 Ellis & E. 516. * 6 A. & E. 645.

² 2 Ellis & B. 148.

³ 7 B. & C. 70, n. (c).

⁴ 4 T. R. 730.

⁵ 15 Q. B. 1012.

⁷ 2 Ellis & B. 148.

⁸ 19 Justice of Peace, 310.

⁹ 1 Ellis & E. 516.

¹⁰ Not reported.

Birkenhead Dock Case Lord Campbell had seemed to disregard that doctrine, he did not disregard it when he came to the case of buildings connected with the administration of justice; *The Justices of Lancashire v. The Overseers of Stretford*,¹ where buildings provided by the county justices for a police station, were held not rateable.

This is property held by trustees appointed under Acts of Parliament who are under an obligation to do certain acts which are essentially of a public nature. The trustees derive no profit from the occupation of this property; all the profits are applicable to universal public purposes, and consequently there is no liability to rate.

Mr. Mellish replied.

THE LORD CHANCELLOR (LORD WESTBURY) moved that the following questions be put to the Judges: 1. Are the Mersey Docks and Harbour Board "occupiers" of the docks vested in them, within the true meaning of the word "occupier" in the Statute of 48 Eliz.?

* 460 * 2. If they are occupiers within the statute, are they exempted from liability to be rated for relief of the poor by the operation or effect of the Statutes 4 Vict. c. 30, 9 & 10 Vict. c. 119, 11 Vict. c. 10, 18 & 19 Vict. c. 174, and 21 & 22 Vict. c. 92, or any of them, or by reason of the purposes for which they occupy the same, or on any other ground appearing in the special case?

3. Does the Act of 20 & 21 Vict. c. 162 (the Act of 1857), impose upon the board a liability to poor rate in respect of the docks' estate and property vested in the board, or any and what part thereof, by virtue of the 26th and 27th sections of the last-mentioned Act?

LORD CHIEF BARON POLLOCK, in the name of the Judges, requested time to consider these questions.

July 7.

MR. JUSTICE BLACKBURN read the opinion of the majority of the Judges. He said: My Lords, the opinion which, with your Lordships' permission, I am about to read, contains the joint an-

¹ Ellis, B. & E. 225.

swers to your Lordships' questions of the Lord Chief Baron, Mr. Justice Williams, Mr. Justice Mellor, Mr. Baron Pigott, and myself.

To the first question, put to us by your Lordships in these causes, we answer, that in our opinion the trustees constituting the Mersey Docks and Harbour Board are occupiers of the docks in question, within the true meaning of that word as used in the Statute of 43 Eliz. c. 2.

Our reasons for that opinion are as follows: Statute 43 Eliz. c. 2, § 1, requires the overseers of every parish to raise by "taxation of every inhabitant, parson, vicar, and other, and of every occupier of" various kinds of real property, and *inter alia* of "lands in the parish, in such *competent sum as they *461 shall think fit," a stock for setting the poor of the parish to work, and for the relief of the poor of the parish.

Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. It would appear, from the passages cited at your Lordships' bar from Dalton's Country Justice, that this was determined very shortly after the statute was passed. It has always been so held, and the Legislature, by the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), has affirmed this principle, by enacting that no rate shall be valid unless made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

In order, therefore, that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of the maintenance would leave no overplus, there is nothing to rate.

The question whether replevin lies has been waived, and there-

fore it is not necessary further to consider whether in such
 *462 a case the more proper expression would * be that the person in possession of the property was not an occupier at all within the meaning of the Statute of Elizabeth, so that the overseer had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin or trespass; or whether, as seems to have been the opinion of the Court of Queen's Bench in *The Overseers of Birmingham v. Shaw*,¹ and *The Queen v. Bradshaw*,² he is an occupier, whom, as such, the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing.

Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words "beneficial occupation" are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase is to be understood in this limited sense, the trustees have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks; at present greatly in excess of what is necessary to maintain the docks. Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks as at present enjoyed by the
 *463 trustees a rent greatly in excess of what would be * necessary to maintain the docks in a state to command that rent.

Where there is an actual demise of property to an occupier who pays rent to the owners of the property, the tenant, if a subject, is rateable, without any regard to the purpose to which the rent is applied. It is immaterial whether the landlord enjoys the rent himself, or is obliged to pay it away as interest to mortgagees, or even (as is the case with the tenants of Crown property) pays it into the consolidated fund or the privy purse of the Sovereign. The

¹ 10 Q. B. 868.² 29 Law J., N. S., M. C. 176.

occupier in each case is rateable. And if the matter were now for the first time to be determined without reference to decisions, it would seem that where the owners of the property are themselves in occupation and receive the value, the amount of which is measured by the rent which the hypothetical tenant would give, the purposes to which that amount is applied ought to be as immaterial as if there had been a real demise at that rent; and the occupiers, if subjects, ought to be rated, whatever be the object for which the property is occupied, unless some special enactment exempted them. But decisions have now settled that there is an exemption; and the important question in the present case is, what is the nature of the occupation and of the purposes which bring the occupier's case within that exemption. And on this question the decisions are to some extent inconsistent, and it is necessary to examine them.

The Crown, not being named in the Statute of Elizabeth, is not bound by it; and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by her Majesty, nor on those occupied by her servants for her Majesty.

The exemption depends entirely on the occupier and *not on the title to the property. The tenants of Crown *464 property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the Sovereign, but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property, *The Queen v. Lady E. Ponsonby*.¹ On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of her Majesty no rate can be imposed, *Lord Amherst v. Lord Sommers*.²

So far the ground of exemption is perfectly intelligible, but it has been carried a good deal further, and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of

¹ 3 Q. B. 14.

² 2 T. R. 372.

such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the Post-Office, *Smith v. Birmingham*,¹ the Horse Guards, *Lord Amherst v. Lord Sommers*,² or the Admiralty, *The Queen v. Stewart*,³ in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police, *Justices of Lancashire v. Stretford*;⁴ to county buildings occupied for the assizes, and for the Judges' lodgings, *Hodgson v. Local Board of Carlisle*;⁵ or occupied as a county Court, *The Queen v. Manchester*;⁶ or for a jail, *The Queen v. Shepherd*.⁷

In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the sovereign, so as to make the occupation that of her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*. And the decisions are uniform, and were not disputed at the bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes further.

There are several cases relating to charities which were mentioned at your Lordships' bar, but were not much pressed, nor, as it seems to us, need they be considered now; for, whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption.

There is however one case on this subject, that of *The King v. St. Luke's*,⁸ which it is necessary to notice on account of the effect which in *The King v. The Commissioners of Salter's Load Sluice*,⁹ was attributed by Lord Kenyon to part of what fell from Lord Mansfield in that case. In *The King v. St. Luke's*, the question before the Court was whether Joseph Mansfield was rateable as occupier of St. Luke's Hospital; but the Court entered
*466 into the larger question, whether there *was any one who

¹ 7 Ellis & B. 483.

² 2 T. R. 872.

³ 8 Ellis & B. 360.

⁴ Ellis, B. & E. 225.

⁵ 8 Ellis & B. 116.

⁶ 3 Ellis & B. 336.

⁷ 1 Q. B. 170.

⁸ 2 Burr. 1053.

⁹ 4 T. R. 730.

could be charged as occupier, saying very truly that unless there was some one who could be so charged, no rate could be imposed. Lord Mansfield as to that is reported to have said, "As to the lessees, mere nominal trustees cannot be esteemed occupiers, or rated as such." In the subsequent case of *The King v. St. Bartholomew's*,¹ Lord Mansfield says that the Corporation of London "are not *de facto* the occupiers of St. Bartholomew's Hospital; the poor are the occupiers, but they are not rateable." This may perhaps show that Lord Mansfield only meant to lay down the position that those in whom the legal estate is vested are not necessarily the occupiers; which is no doubt true: no one could contend that the person in whom a term assigned to attend the inheritance had vested, could be rated as occupier, in point of law, of the estates *de facto* occupied by his cestui que trust. But if Lord Mansfield meant (as it rather seems that Lord Kenyon thought he did), that the persons in actual valuable occupation of property are not rateable if they occupy in a merely fiduciary character, it is a position which cannot be maintained. The counsel for the trustees of the Mersey Docks and Harbour Board, at your Lordships' bar, did not attempt to maintain any such general position; they limited themselves to contending that such was the law where it was a public trust, for which they cited authorities which they said must be overruled unless that position was maintained. And we think they were justified in so saying; but we also think that there are conflicting decisions which must be overruled if it is maintained.

The first case in which the position was advanced that trustees occupying valuable property, but prohibited from * taking any individual benefit from it, were not rateable, * 467 seems to have been that of *The King v. Mayor of London*,² decided in 1790. There Mr. Justice Buller in his judgment says, "Now, it has been objected that they are not liable to this rate, because they hold it on a public trust; but in the first place, it does not appear to be the case of a trust at all; and if it did, perhaps the consequence contended for would not necessarily follow." It certainly seems that the doctrine contended for was not at that time, 1790, considered as established.

*The King v. The Commissioners of Salter's Load Sluice** was decided in 1792. In the argument the clauses of the Act under

¹ 4 Burr. 2435.

² 4 T. R. 21.

³ 4 T. R. 730.

which the commissioners held were referred to, and argued on, but Lord Kenyon's judgment does not appear to have proceeded on the ground that their effect was to prohibit the payment of poor rate. He says, "The trustees have a bare naked trust, not coupled with any interest. If any interest resulted either to the commissioners or to the owners of the adjoining land after the public purposes of the Act were answered, these tolls might have been rated. But it is admitted that all the money which is collected under this Act of Parliament must be expended for the purposes of the Act, and therefore, upon the ground upon which the Court proceeded in *The King v. St. Luke's Hospital*, namely, that there was no occupier, these commissioners are not liable to be rated."

The counsel for the parish and township in the cases at your Lordships' Bar did not attempt to deny that this decision was in favour of their opponents; they admitted (and we think quite properly admitted) that the decision was against them, but * 468 they denied that it was law. The * counsel for the Mersey

Board were fully justified in relying on this case, as entitling them to the benefit of Lord Kenyon's judgment; but we think that when they proceeded to argue that the decision acquired additional authority because it was acquiesced in, they fell into a fallacy. When the Court of Queen's Bench has decided in favour of a rate, those who are rated may, if they are so advised, bring replevin, and (subject to the question whether replevin lies in such case) may carry the case up to the House of Lords; and, therefore, where a decision in favour of a rate is not disputed further, it may properly be said to be acquiesced in. But when the Court of Queen's Bench has decided against a rate, and quashed it, there is no way whatever in which the parish officers can raise the question again; and acquiescence in a decision cannot add any weight to it when there is no possible way of disputing it.

The next cases to be found in the reports in which any similar points arose were those of *The King v. Liverpool*,¹ and *The King v. The Weaver Navigation*,² in 1827. It appears from the papers in the appendix to this special case, that in 1806 the Liverpool Sessions made an order excluding the Liverpool Docks from a rate for the relief of the poor of the parish of Liverpool, subject to a case intended to obtain the opinion of the King's Bench on the question whether the Mayor, &c. of Liverpool were rateable as occupiers

¹ 7 B. & C. 61.

² 7 B. & C. 70, n. (c).

of the docks ; and that in 1808 the order of Sessions was confirmed, but under what circumstances does not appear.

The late Lord Abinger was counsel for the parish, both in that case and in the case of 1827 ; and the attorneys of the Corporation of Liverpool in 1827 could not be ignorant * of * 469 the circumstances attending the confirmation of the order of Sessions in 1806. Yet on the argument in the case reported in 7 B. & C., neither side alludes to what, if a decision at all, must have been precisely in point. It seems, therefore, probable that, though the rule confirming the order in 1808 is not drawn up as by consent, the former case was compromised, and that there was no decision of the Court in 1808.

However this may be, there can be no doubt that the Court of King's Bench in 1827 acted upon the authority of *The King v. Salter's Load Sluice*,¹ Lord Tenterden saying, " Here the trustees were not occupiers in the ordinary sense of the word, and no profit was received for the use of any person " ; and Mr. Justice Bayley saying, " The principle of this decision is applicable to the case of *The King v. The Trustees of the River Weaver Navigation*. There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes ; and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees."

There is no dispute that those two decisions, if they are to be followed, are decisive in favour of the trustees of the Mersey Docks, at least in the first of the cases at your Lordships' bar, and reduce the case of the overseers of Birkenhead to that point mentioned in your Lordships' third question.

The next case to which it is necessary to call attention is that of *The Governors of the Bristol Poor v. Wait*,² * decided * 470 in 1836. In that case the governors of the Bristol poor had taken property for the purpose of putting out their poor there. A rate had been imposed on them in respect of this occupation, and was levied by distress. The governors of the Bristol poor brought replevin for the purpose of questioning the validity of this rate. In the judgment of the Court the point raised is said to be " whether the plaintiffs were such occupiers of the property as to

¹ 4 T. R. 730.

² 5 A. & E. 1.

be rateable to the poor." And the decision was that they were. The Judges who decided this case probably did not suppose that they were deciding any thing inconsistent with the decisions in *The King v. Salter's Load Sluice*, and *The King v. Liverpool* and *The King v. Trustees of the Weaver Navigation*, which appear not to have been cited on the argument, or brought to their notice. But we do not see how the cases can stand together. The governors of the poor of Bristol were as much bare naked trustees having no personal interest in the occupation of this property as the commissioners of Salter's Load Sluice, and if the one set of trustees were, on that ground, not occupiers, we do not see how the others could be occupiers; and if the application of the surplus funds of the Weaver Navigation to the bridges and highways of Cheshire, so as to be in relief of the county rate, was a public purpose rendering the trustees of that navigation not rateable, it is difficult to see why the application of whatever value was derived from the lands occupied by the governors of the Bristol poor to the maintenance of the poor of Bristol, and so in relief of the poor rate of the city of Bristol, was not a public purpose also. We think that in this case, the Court of King's Bench, probably without being aware of it, came to a decision inconsistent with, and, there-
 * 471 fore, * shaking the authority of the three cases, *Salter's Load Sluice*, *Liverpool Inhabitants (1827)*, and the *Weaver Navigation*.

The decision in *The Governors of Bristol Poor v. Wait* has been repeatedly acted upon, and never questioned that we know of. As the decisions in that case and those which followed it, were decisions in favour of the rate, and, consequently, might have been questioned in replevin, the acquiescence in them does add something to their authority.

The Municipal Corporation Act (5 & 6 Wm. 4, c. 76) restricted the power of the municipal corporations named in schedules A. and B. to that Act, over what had been their private estates, and compelled them to pay the net proceeds into the borough fund, which was applicable first to the payment of the existing debts of the corporation, and then to the corporation expenses; and the surplus, if any, for the public benefit of the inhabitants and the improvement of the borough. The Court of Queen's Bench in *The Queen v. The Mayor, &c. of Liverpool*,¹ decided in 1839

¹ 9 A. & E. 435.

that the effect of this enactment was to render corporations no longer liable to be rated in respect of any property occupied by them. The reason given by the Judges for this decision was that they found "the principle settled by the decisions already made, and felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority." They proceed to state the cases of *The King v. Liverpool*,¹ and *The King v. Trustees of Weaver Navigation*,² and say, "We feel it to be impossible substantially to distinguish these cases, and especially the * latter from the present. The extent and approximation * 472 to something like national benefit are in kind, and almost in degree the same. The public in the one case is the same town of Liverpool, in the other the county of Chester." They do not explain why the same argument did not avail in *The Governors of Bristol Poor v. Wait*, where the city of Bristol was held not to be the public; but they did not intend to depart from that decision, and in the same year acted upon it in *The Queen v. The Guardians of Wallingford*,³ in which latter case an attempt, but, as it seems to us, not a successful one, is made to reconcile the decision with that in *The Queen v. Mayor, &c. of Liverpool*.

Mr. Justice Crompton, in *The Tyne Commissioners v. Chirton*,⁴ stated that the decision in *The Queen v. The Inhabitants of Liverpool* created at the time great surprise. We think, however, that the conclusion come to by the Court in that case does logically follow from the decisions in *The King v. The Inhabitants of Liverpool*, and *The King v. Trustees of the Weaver Navigation*, and that the Judges in that case had to choose whether they would consider it a *reductio ad absurdum*, and say that decisions leading to such a conclusion must be wrong in principle, or to say that, the decisions being binding on them, they must hold that the conclusion was not wrong. They adopted the latter course, apparently not at that time perceiving that it was inconsistent with the principle of their own decision in *The Governors of the Bristol Poor v. Wait*. A few years later the Court of Queen's Bench, in several cases to be presently cited, adopted the former course, and the question now pending in your Lordships' House seems to us to be in substance, which class of decisions is to be followed in future?

¹ 7 B. & C. 61.² 10 A. & E. 259.³ 7 B. & C. 70, n. (c).⁴ 1 Ellis & E. 516.

* 473 * The effect of the decision in *The Queen v. The Mayor, &c. of Liverpool* was immediately nullified by the Act 4 & 5 Vict. c. 48; but that enactment did not declare the decision erroneous. On the contrary, the Act was couched in language which, though not declaring the decision to be law, indicates that the framers of the Act thought that it was law; and the fact that an Act couched in such terms was passed by the Legislature affords an argument, of more or less weight, that the error of the Court, if it was one, had been acquiesced in, and had become *communis error*.

This is, we think, the latest authority in point of date relied on by the counsel for the Mersey Docks and Harbour Board.

The next case in order of date was *The Queen v. Badcock*,¹ in 1845. In the judgment of the Court, the conflicting cases are cited. The Court does not attempt to reconcile them, but observes that in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability, "the public, as such, unlimited by the bounds of county, borough, or parish, had a direct interest in the benefit which the application of the funds produced," and that the case then before it did not come within that principle. The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of government. But the principle thus laid down cannot be made to embrace either *The King v. The Trustees of the Weaver Navigation*, where the funds were applicable to the relief of the county rate of Cheshire, or *The Queen v. The Mayor, &c. of Liverpool*, where the funds were brought into the borough fund in relief of the borough rate in that particular borough.

In *The Queen v. Longwood*² in 1849, the Court of Queen's Bench, acting upon the principle laid down in *The Queen v. Badcock*, held that the Commissioners of the Huddersfield Water Works were rateable to the relief of the poor.

All the cases which we have hitherto cited were decided before Lord Campbell took his seat upon the bench. It is right to notice this, for it has often been supposed, and indeed was said in the argument at your Lordships' bar, that the decisions in his time, on the subject of the exemptions from rates, were innovations in-

¹ 6 Q. B. 787.

² 13 Q. B. 116.

introduced in consequence of his strong individual opinion that the exemptions from rateability had been carried further than was warranted by law or reason ; but we think that the cases which we have cited show that, before he came upon the bench, that opinion had been entertained and acted upon, and that, in consequence, the decisions had got into such a state as to be inconsistent with each other ; so that it had become necessary to overrule one set of these decisions, unless the law was to be administered without any reference to principle, deciding each case as it arose, according as the facts might be supposed to approximate more nearly to those in the one set of decisions or the other.

Several cases were decided in Lord Campbell's time which closely resembled that of the Huddersfield Commissioners (*The Queen v. Longwood*), and which were decided in the same way, without rendering it necessary to go further than had been done in that case, until, in 1852, * the case of *The Trustees of Birkenhead v. Overseers of Birkenhead*¹ arose. Mr. Justice Crompton was a party to that decision, and in *The Tyne Improvement Commissioners v. Chirton*, he has given some account of the deliberations on that case (though his observations were misunderstood by the reporter), and he repeated it during the argument, in the Exchequer Chamber, of this case. It appears that this learned Judge was at first startled at being called upon to act on a principle in direct opposition to the considered decision of the Court of Queen's Bench, in *The Queen v. Mayor, &c. of Liverpool*,² though he had always thought that decision wrong ; and that he was the more unwilling to act in direct contradiction to that case, because the Legislature, in 4 & 5 Vict. c. 48, when enacting that the decision should no longer be practically operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law ; and he doubted whether the case should not be followed, though not approved of, leaving it to the Legislature to correct it. The other Judges of the Court thought that the time had come when the Court could no longer halt between two sets of decisions, but must follow that which was law ; and Mr. Justice Crompton ultimately agreed with them. Lord Campbell in his judgment (perhaps out of deference to the doubts which Mr. Justice Crompton had at first entertained), seeks to avoid expressly overruling the previous de-

¹ 2 Ellis & B. 148.

² 9 A. & E. 435.

cisions ; and suggests that perhaps *The King v. The Commissioners of Salter's Load Sluice*, and *The King v. Inhabitants of Liverpool*,¹ may be distinguishable on the ground that the Private Acts in those cases were construed by the Courts as amounting

* 476 * to a prohibition to pay poor rate. But the counsel on both sides at your Lordships' bar agreed that no such distinction could be maintained, and we think that neither Lord Kenyon nor the Court of King's Bench in Lord Tenterden's time proceeded on any such ground. And in the subsequent cases of *The River Lea Navigation*² and *The Tyne Improvement Commissioners v. Chirton*, in 1859, no such distinction was made. The Court of Queen's Bench in that last case acted upon the broad principle that though, where the property was occupied for public purposes, "such as," says Lord Campbell, "a post-office, or a military store depot, where the purposes for which the property is occupied are purposes created by the Government of the country," there was no rateable occupier, the occupation of a public dock was not an occupation for such public purposes, and that the commissioners occupying such a dock were rateable in respect of the value of that occupation, estimated according to the rule laid down in the Parochial Assessment Act, unless an exemption was conferred by some subsequent statute ; and that the enactments in the Tyne Improvement Acts as to the application of the rates received (which are in substance the same as those in the Liverpool Acts), did not amount to such an exemption ; and Mr. Justice Crompton, after stating his former doubts when the Birkenhead case was argued, said that he now thought that case laid down the proper rule. This, we think, must be considered as the rule now acted upon in practice in the Court of Queen's Bench.

Such being the state of the authorities, it seems to us no longer possible to support the decisions relied on by the counsel
* 477 for the Mersey Docks and Harbour Board. * We quite agree that it is very desirable to adhere to decided cases, though this principle may be carried too far. It has been forcibly remarked by an American author of repute,³ that where the objection to the decisions "is inconsistency with admitted fundamental principles, it is an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a science to

¹ 7 B. & C. 61.

² Phillips on Insurance, 393, n. (g).

³ 19 Justice of Peace, 310.

an aggregation of dogmas." Still, the inconvenience caused by unsettling the law and disturbing what was quiet, is so great, that we agree that even a Court of error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error, and leave the remedy to the Legislature. It may be that the attention of the Judges of the King's Bench had in 1836 been called to the case of *The King v. Liverpool*, and *The King v. Weaver Navigation*,¹ before they decided *The Governors of the Bristol Poor v. Wait*, this principle, which is strongly laid down in *Crease v. Sawle*,² would have led them to decide *The Governors of the Bristol Poor v. Wait* otherwise than they did. But all this inconvenience has been already incurred, the recent decisions have been such as to disturb the quiet state of things, and a decision of your Lordships' House affirming the non-rateability of the Liverpool Docks must reverse the decision in *Tyne Commissioners v. Chirton*, and render the docks in the Tyne not rateable. And such a decision, though not necessarily reversing the numerous decisions based on *The Governors of the Bristol Poor v. Wait*, by which poorhouses and gasworks and waterworks in the hands of public trustees have been held rateable, must greatly shake their authority and *disturb a principle of rating now *478 generally adopted throughout the country. The balance of convenience, if that be a legitimate consideration, is now in favour of adhering to the more recent decisions. And if we view the case on principle, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated. *

The counsel referred to many expressions in the local Acts showing that the Mersey Docks were thought likely to confer great public benefit, and to be very advantageous to the commerce of this country; and there is no doubt that that expectation has been realised, and that these docks are of great public benefit; but not more so than the docks in the river Thames, all of which are in the hands of private companies, and are undoubtedly rateable.

The rate is to be withheld, not in respect of the value of the benefit conferred on the public, or on that portion of it which uses the dock, but is to be imposed on the occupiers of the docks in respect of the value to them derived from the payments taken for

¹ 7 B. & C. 61, 70, n. (c).

² 2 Q. B. 862.

that use. And we think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a company under an Act of Parliament incorporating "The Companies Clauses Act," and "The Harbours, Docks, and Piers Clauses Act, 1847," and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board.

A company forming docks under an Act of Parliament incorporating these Acts is bound to maintain the docks, and to keep harbour masters and other officers there, and to allow the public to use the docks on payment of the rates, and to allow her Majesty's vessels to use them without making any payment;

* 479 and by these means they * confer a benefit on the public;

the company by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital; and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached, the rates must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour masters and others who manage it, we change the name of the body which occupies it from that of "the Company," to that of "the Board"; and if, instead of "the Company" paying to the shareholders a maximum dividend on their capital, the "Board" must pay to the same individuals the same identical sums, but call them "interest on bonds" instead of "maximum dividend on share capital," what difference does this make? If *The King v. Liverpool*¹ is to be supported, it makes this difference, that what was formerly an occupation in respect of which the Company was rateable, has, by this change of name, without any change in the thing, become an occupation for public purposes, for which the Board is not rateable. If the decision in *The Tyne Commissioners v. Chirton* is to be supported, the change in name makes no difference in the rateability.

We think the latter the correct view of the law, and therefore we answer your Lordships' first question in the affirmative.

We now proceed to answer the second question put by

¹ 7 B. & C. 61.

* your Lordships. And we are of opinion that there is * 480 nothing in the matters referred to in your Lordships' questions to exempt the board from being rated in respect of this occupation.

We have already, in answering your Lordships' first question, given our reasons for thinking that the purposes to which the rates are applicable, are not such as to exempt the trustees from rateability; and we are further of opinion that the effect of the statutes applicable to the Liverpool Docks is not such as to exempt them from the payment of poor rate. There are no negative words prohibiting the application of the rates to payment of the poor rate. And we think, in conformity with the decision in *The Tyne Commissioners v. Chirton*,¹ that enactments directing that the revenue shall be applied to certain purposes, and no others are directory only; and mean that after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes.

We have only, therefore, to consider the reasons on which the Judges in the Court of Exchequer Chamber based their decision in the first of the present cases; and, with very great respect for those who concurred in that judgment, we think that they acted on a principle sound in itself, but not applicable to the case before them.

Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before; * and, unless there is something to re- * 481 but that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise. And if the decision in *The King v. The Inhabitants of Liverpool*, had been that certain words used in the former Acts had amounted to an exemption from poor rate, and those same words had been repeated 'in the subsequent Acts, it would, on this principle, have been a fair inference that the Legislature intended by using the same words to give the same exemption. But this is not the case here. The Legislature had by former Acts conveyed to the trustees the Docks to be held for certain purposes.

¹ 1 Ellis & E. 516.

The Court of King's Bench had decided that, as an incident of law, those who held land for such purposes were not rateable to the relief of the poor. When the Legislature again in fresh Acts used the same language, it showed that it intended to convey the land to be occupied for the same purposes; and that if the law did annex non-rateability as an incident to such an occupation, the Legislature had no objection. But it did not afford any argument that the Legislature intended to annex that incident in case it should be discovered that it was not annexed by law. And the clauses enacting that the warehouses should be rated, carry this argument no further.

During the course of the argument at your Lordships' bar, the Lord Chancellor put the case of an express recital in the Act, to the effect that it had been decided in *The King v. The Inhabitants of Liverpool*, that the dock trustees were not liable to poor rate in respect of land occupied by them, and that it was expedient that no such exemption should be given to them in respect of the occupation of new warehouses acquired under the new Act, and

•482 then, after that recital, an enactment in the terms in * which it is now expressed. And he asked the counsel at your Lordships' bar two questions. First, whether such a recital could be construed to amount to a declaratory enactment, that the decision in *The King v. Liverpool* was good law? Secondly, whether the Acts framed as they were, could have a greater effect than they would have had, if framed with such an express recital? The counsel for the Mersey trustees were not able to give any answer to those questions that would support the decision of the Court of Exchequer Chamber. Mr. Justice Blackburn (the only Judge who, being a party to the decision in the Exchequer Chamber, was also present at the argument at your Lordships' bar) admits that he cannot answer them, and his inability to do so has led him to change the opinion which he entertained when in the Exchequer Chamber. We have no reason to believe that the other Judges who joined in that judgment have changed their opinion. We have most sincere deference for their judgment, and as we have had no opportunity of hearing what answer they would have made to the way the case has been put in your Lordships' House, it is with diffidence that we have formed our opinion that they have misapplied the ground of their decision; but entertaining that opinion, we are bound to express it.

We therefore answer your Lordships' second question in the negative.

The answers which we give to the first and second questions put by your Lordships in effect answer the third question. In our opinion the liability to poor rate is imposed on the board by the general law, and not by virtue of the sections of the Act referred to. We therefore answer your Lordships' last question in the negative.

* MR. JUSTICE BYLES. — In answer to your Lordships' *488 first question, I am of opinion that the Mersey trustees are not occupiers within the true meaning of the Statute 43d Elizabeth.

No doubt they are occupiers in the strict legal sense of that word; that is to say, they are in possession of the land, and are the proper parties to bring an action of trespass. But the sense in which your Lordships use the word "occupiers," is the sense in which it is used in the earlier leading cases on the subject, and that sense must be borne in mind in order to understand those cases.

I conceive that the occupation, to be an occupation within the statute, must be a beneficial one. The rate is to be raised "according to the ability of the parish," and "by taxation," both which expressions import, first, that the occupation is to produce profit or pecuniary benefit to the occupier himself, or some one whom he represents; and secondly, that each assessment is to be in proportion to that benefit. This construction is fortified by the consideration that the statute, when it was passed, authorised an assessment in respect of personal as well as of real property.

Accordingly, such has been the construction of the statute from the earliest times; indeed it may be said that such was the contemporaneous exposition. The date of the statute is 1601. It was stated at your Lordships' bar, that the first edition of Dalton's Justice was published a year or two after that date, and that the author in that edition says, that the overseers are to raise the rate by taxing the occupiers, "proportioning them to an annual benefit." I have not had access to the earlier editions of this work, but certainly those words are repeated in the fifth edition published in 1685.

It seems, therefore, plain from the object of the Act, *from *484

its words, and from the earliest exposition, that the occupier must, in order to be rateable, enjoy a beneficial occupation.

It is not essential that this occupation should be for the individual benefit of the occupier himself; it may be for the benefit of another; it may be for the benefit of a plurality of other persons, of a considerable number of other persons, or even of a number not certainly defined, but limited by locality or other circumstances. Yet I conceive that if the property be occupied for the benefit, not of a number of individuals more or less defined, but for the benefit of the public at large, then it is not rateable. This conclusion seems to me to be the result of a long series of authorities.

I do not rely on the exemption of the Crown; for that exemption would take place on the principle that the Crown is not bound by an Act of Parliament, unless named therein. But even this exemption is merely personal, for tenants of the Crown occupying for their private benefit, are rateable.

Whether occupiers for the service of the general government are exempt on the ground that they represent the Crown, may be doubtful. It should rather seem that they are exempt, because they occupy for public purposes. Thus the Birmingham post-office was held not rateable, Lord Campbell treating it as clear, but expressing regret "that property taken for public purposes is not rateable," *Smith v. Guardians of Birmingham*.¹ Upon the same ground an occupation by the Horse Guards (*Lord Amherst v. Lord Sommers*)² was held not rateable; Mr. Justice Buller and Mr.

Justice Ashhurst laying it down as law, not only that the * 485 possessions of the Crown * were not rateable, but that the possessions of the public were not rateable, and that in the case then before them, the plaintiff was exempt, "because he was like a trustee for the public, deriving no benefit for himself."

The exemption is not confined to premises occupied for the purposes of the general government, it extends to occupations for the purposes of local government also. Thus buildings occupied by the local police, "held," say the Court, "for public purposes," *Justices of Lancashire v. Stretford*; ³ a shire hall, *Hodgson v. Local Board of Carlisle*; ⁴ the county Court, *The Queen v. Manchester*; ⁵ a county jail, *The Queen v. Shepherd*; ⁶ reformatory schools sup-

¹ 7 Ellis & B. 483.

² Ellis, B. & E. 230.

³ 3 Ellis & B. 336.

⁴ 2 T. R. 372.

⁵ 8 Ellis & B. 116.

⁶ 1 Q. B. 170.

ported by voluntary subscriptions, open to several counties, and within the Statute 17 & 18 Vict. c. 86, *Sheppard v. Bradford*,¹ are all exempt from poor rates.

The exemption extends to trusts and charities for the benefit of the public at large, though entirely unconnected with government. Public hospitals are exempt. St. Luke's Hospital was held not rateable, on the ground that there was no beneficial occupier, *The King v. St. Luke's Hospital*; ² so was St. Bartholomew's Hospital.³ I conceive that the exemption of hospitals and other charities stands on the ground, not that they are charities, but that they are public charities, and that there is no beneficial occupier except the public; and so the Judges in the Queen's Bench held, when they decided that Bethlehem Hospital was not rateable; ⁴ so also they held in a recent case, *The Queen v. Stapleton*,⁵ and the Court of Common Pleas also, in the case of *Sheppard v. Bradford*.⁶

* Both Courts, in these two cases, draw a distinction be- * 486
tween private and public charities, holding the first rateable, and the other not rateable. "The premises," says the Court of Queen's Bench in the first case, are "occupied for the purposes of a highly laudable charity, but one of a strictly private nature." The same distinction was taken by the Court of Queen's Bench in some other cases, particularly *The Queen v. Licensed Victuallers' Society*,⁷ and *The Queen v. Baptist Missionary Society*.⁸

On the same ground of dedication to public purposes reposes also the exemption of churches and other places of religious worship. Even before the recent statute, churches and chapels were exempt from rates, if no profit to individuals was actually made by letting the pews; *The King v. Woodward*,⁹ *The King v. Agar*.¹⁰ So that it is a mistake to suppose that the exemption of churches and chapels depends merely on the Statute of 3 & 4 Wm. 4, c. 30. That statute, which applies to church rates as well as poor rates, and probably with an original and especial view to the former, extended the then existing exemption, by exempting from rates all places dedicated exclusively to public religious worship, even when the pews are let, and profit is thus made of the building.

¹ 33 Law J. N. S., M. C. 182.

² 2 Burr. 1053.

³ 4 Burr. 2435.

⁴ 10 Q. B. 865.

⁵ 33 Law J., N. S., M. C. 17; 4 Best & S. 629.

⁶ 33 Law J., N. S., M. C. 182.

⁷ 1 Best & S. 71.

⁸ 10 Q. B. 884.

⁹ 5 T. R. 79.

¹⁰ 14 East, 256.

In *The King v. Mayor of London*,¹ where the question arose whether certain trustees of a barge way and toll gate should be rated, Mr. Justice Grose says, that "to exempt themselves from the rate, the trustees should have shown that they were trustees for the public." In *The King v. Salter's Load Sluice*,² the * 487 property was * held not rateable, because all the money collected must be expended for what Lord Kenyon calls the public purposes of the Act.

The history of the property now under your Lordships' consideration, in many ways confirms the position that property occupied for public purposes, is not rateable. From the earliest construction of the Liverpool Docks, in the time of Queen Anne, down to the year 1806, they had never been rated; but in 1806 an attempt was made to rate them. The Sessions quashed the rate; and the Court of Queen's Bench (whether by consent or otherwise does not appear), confirmed the order of Sessions. The attempt, however, was repeated about twenty years after, in 1827; and the case was then fully argued. The statutes were brought before the Court; those statutes directing then as now, that certain burdens should be discharged, and that after their discharge the rates should be lowered. The Court of Queen's Bench held that there was no beneficial occupation in any person, and confirmed the order of Sessions striking out the assessment; *The King v. The Inhabitants of Liverpool*.³

At the same time *The King v. Weaver Navigation*⁴ was argued and decided in the same manner. "The tolls of the navigation," said Mr. Justice Bayley, "remaining over and above the expenses of supporting the navigation, are to be applied to the building and maintaining of bridges and highways. These are public purposes, and as no part of the moneys received can be applied to private purposes, those moneys are not rateable in the hands of the trustees."

These cases were followed by *The Queen v. The Mayor of Liverpool*,⁵ in which the law was again held to be * 488 clear, that property dedicated to public purposes was not rateable; and the doctrine was applied to the property of the Municipal Corporation of Liverpool situate within the precincts of the Borough of Liverpool, because the General Municipal Corporation Act, 5 &

¹ 4 T. R. 21.

² 7 B. & C. 61.

³ 9 A. & E. 435.

⁴ 4 T. R. 780.

⁵ 7 B. & C. 70, n. (c).

6 Wm. 4. c. 76, had directed that all the surplus funds of the borough should be appropriated for the public benefit of the inhabitants and the improvement of the borough. In the next year the Court of Queen's Bench decided, on the same grounds, that the property of a municipal corporation was not rateable, though situate without the precincts of the borough, *The Queen v. Ex-minster*.¹ In both these cases all the previous decisions were canvassed and confirmed; the foundation of the judgment in both cases being the acknowledged proposition that property dedicated to public purposes is not rateable. The only question was, whether the benefit of the inhabitants of a particular borough, they being but a section of the public, was a public or a private purpose, and in both cases it was held that the property of a municipal corporation was property dedicated to public purposes, and not rateable.

These decisions caused the Statute 4 & 5 Vict. c. 48, to be passed, the language of which is not only very strong to show that the Legislature itself considered that property dedicated to public purposes was not and is not rateable, but seems to me to create a statutable bar to holding that even property owned and occupied by municipal corporations is rateable in cases beyond the scope of the enacting clause. I forbear to comment minutely on the language of the statute because of the length to which the observations would extend, but *almost every line is deserving the attentive consideration of your Lordships. Two observations, however, I must be pardoned for making: first, the statute is not a declaratory, but an enacting statute; secondly, so far from reflecting on the correctness of the then recent decisions, it adopts and affirms them in certain cases, at the end of the proviso to the first section. The statute there continues the exemption from poor rate in cases where the area of the borough and the area covered by a single poor rate are coextensive, because in such a case there is no reason for interfering with the existing law. To put the case in the clearest light; suppose, what has actually happened in some boroughs, and may be the case in many, that the value of the corporate property renders a borough rate unnecessary; and suppose that there is an entire poor rate for the borough, which is also not an uncommon case (either because the borough includes but a single parish, or because the management of the poor in the borough is consolidated by a local Act); in such

¹ 12 A. & E. 2.

a case I conceive that the municipal property is still by the express words of the statute not only exempt, but exempt not because the statute so enacts, but because it had been exempted by law before the Act passed, and the exemption is recognised and continued.

The language, therefore, of the Statute 43 Elizabeth, the whole current of the authorities I have cited to your Lordships, and many others with which I refrain from fatiguing your Lordships, as well as the language of the recent Statute 4 & 5 Vict. c. 48, seem to me to show that land occupied for public purposes is not rateable.

On the other side great reliance was placed by the Over-
*490 seers on the case of *The Governors of the Bristol Poor v. Wait*.¹

But that case seems to me reconcileable with the position that where the general public are the occupiers the property is not rateable, for in that case only some of the public were the occupiers, that is to say, the representatives of the poor of a particular district. Indeed this distinction between the former cases and the case of *The Governors of the Bristol Poor v. Wait* is drawn by the Court of Queen's Bench itself in *The Queen v. Wallingford Union*.² To what extent the property rated is occupied for the public at large is, and always must be, a question of degree, where it is extremely difficult to draw the line, and where it is likely there will be conflicting decisions.

The conflict of the case of *The Governors of the Bristol Poor v. Wait*, if any, is with *The Queen v. The Mayor of Liverpool*, and *The Queen v. Exminster*, where borough property was held not rateable. But even with respect to this apparent conflict, it may be observed, that the occupation was in *The Queen v. The Mayor of Liverpool*, for the benefit of all the inhabitants of a district, and in the case of *The Governors of the Bristol Poor v. Wait* it was only for a portion of the inhabitants, that is to say, the poor of the district. And if your Lordships have to choose between these authorities, I have already called your Lordships' attention to the fact that *The Queen v. The Mayor of Liverpool*, and *The Queen v. Exminster* are recognised by the Legislature as law, and are continued in some cases as the then existing law, up to this moment, by the authority of the statute.

The decision in *The Governors of Bristol Poor v. Wait*
*491 was followed as to the Taunton market in *The Queen v.*

¹ 5 A. & E. 1.

² 10 A. & E. 269.

Badcock,¹ as to the Huddersfield waterworks in *The Queen v. Longwood*,² and as to the Harrogate waterworks in *The Queen v. Harrogate Commissioners*.³

These cases are all subject to the same observation as the case of *Bristol Poor v. Wait*. The question was whether the occupation was for the benefit of the public at large, or for the partial benefit of a section of the public. (See the observations of the Court of Queen's Bench in *The Queen v. St. George's, Southwark*.)⁴

The decision in *Trustees of Birkenhead Dock v. Overseers of Birkenhead Poor*⁵ is really no authority on this point, because it proceeded entirely on the ground that there did not then appear to be, as now there is, a statutable obligation to reduce the tolls when their produce should exceed the expenses. It is quite true, however, that the Court, or at least the Lord Chief Justice, did indicate a wish to depart from the authorities as to the rateability of property dedicated to public purposes.

That case was followed by *The Tyne Commissioners v. The Overseers of Chirton*, which was decided by Lord Campbell and Mr. Justice Crompton on the ground that the parties benefited were only a particular section of the public, viz. those who used the docks. But Mr. Justice Wightman seems to rest his judgment on the ground that it did not appear that there could not be a surplus revenue; and Mr. Justice Hill, though he assents to the conclusion, does not give his reasons, which for any thing that appears, may have been the same as those which influenced Mr. Justice Wightman.

I cannot help thinking that these recent authorities, when the precise point decided in each case, and the *ground on *492 which the judgment proceeded, are carefully examined, will be found, as authorities, not to be at variance with the position that an occupation clearly and entirely for the benefit of the whole public is not rateable. But, whatever weight may be attributable to some of them, or more properly to the expressions of some Judges, it seems to me very slight compared with the weight which ought to be attributed to the antiquity, number, and consistency of the authorities, which show that overseers cannot usurp the authority of Parliament in taxing the general public.

¹ 6 Q. B. 787.

² 15 Q. B. 1012.

³ 2 Ellis & B. 148.

⁴ 18 Q. B. 116.

⁵ 10 Q. B. 867.

Then comes the next inquiry. Is the property now under consideration occupied for the benefit of the public at large ?

Primâ facie it should seem that it is so, for not only have all the Queen's subjects a right to use the docks at their free will and pleasure, paying their fair contribution to the expenses and nothing more, but all persons whatsoever, from what quarter of the globe soever they may come.

It is objected first, that the use of the docks is not for all the public, but only for a section of the public, that is to say, for as many of them as have invested their capital in ships or barges or boats.

It might also be said that a navigable river cannot be a public highway, because it is only for those who have invested their capital in ships or barges or boats ; or that a public turnpike road, or indeed any public highway, is not a public carriage-way or bridle-way, because, when used as a carriage-way or bridle-way, it is only for those who possess or use carriages or horses.

It is objected further by the appellants that the encumbrances on the docks have the effect of making them rateable. It is *498 contended as interest and a portion of the * principal of the debt are annually paid to the bondholders out of the produce of the tolls, that, to this extent at least, there is a beneficial occupation by the board in trust for the bondholders ; because it is said that if a tenant from year to year occupied the property and received the tolls without paying the instalments of the principal and the periodical interest of the debt, he would be willing to pay a rent, and that this theoretical rent is the criterion and measure of the rateable value of the occupation.

But I conceive that no tenant could be supposed to receive the tolls without paying the charges. The tolls are appropriated to the payment of the expenses, including charges of construction and repair, and never can by law exceed that limit. As soon as the tolls do exceed it, they are by law to be reduced. If the amount now paid every year to the bondholders, had been actually incurred for construction and repair in that year, it is plain there could be no rent. But the payment made in each year is still but the cost of construction and repair proportioned to that year, and spread over several years and averaged. If the fact that the expenses have not been incurred within the year created a distinction, then a bricklayer's or mason's bill not paid within the year,

but charged on the next or following years, would make the land in those years rateable. It can make no difference that the creditor is not the bricklayer or mason himself, but the assignee of the debt due to the bricklayer or mason.

It is quite true that when land is let to a tenant, the value of the occupation to the occupier is alone considered in estimating its rateable value, and charges on the reversion are not regarded and are not deducted. But the payments made out of the tolls in discharge of debts and interest in the case now before your Lordships are not charges on a supposed reversion; they represent what are, *in ordinary cases, expenses annually *494 incurred to enable the land to command the rent. They are like tithes, or tithe commutation rent charge, which must be paid by the occupier to prevent the tithe owner from entering; or, like contributions to a sea wall, to prevent the land from being overflowed; or like the annual and periodical expenses for repairs; all which are to be deducted in estimating the annual letting and rateable value of property (see 6 & 7 Wm. 4, c. 96, and 25 & 26 Vict. c. 103).

It may, indeed, be said that the expenses incurred in permanently improving land, e. g. in building a house on the land, are additions to, and not deductions from, the rateable value, though the annual average repairs of that house when built are so. But when a private house is built, the disposable annual income derived from the land is increased, and, therefore, the rateable value of the land is augmented. But in the case before your Lordships the disposable annual income from the docks is not and never can be augmented; for the tolls always must be reduced to such a point as to leave no disposable income.

The objection of the overseers that these charges are to be treated like mortgages or charges on the reversion of ordinary property, and not to be regarded in estimating rateable value, seems inconsistent with itself, for the argument rather tends to show that they are to be regarded, not, indeed, as a deduction, but as causing an addition to the value, and that the docks, when encumbered with debt, are rateable, and, when free from encumbrance, are not rateable.

Again, if these docks are rateable on the ground of the debts and interest owing by them and secured upon them, then it will follow that in the case of turnpike roads which are involved

* 495 in debt (at least in those cases where the * soil is in the commissioners, as sometimes happens), the road will be rateable to the poor, because, being involved in debt, the bondholders receive interest.

It is objected, lastly, by the overseers, that there is no substantial distinction between docks made by a joint stock company and the docks now under consideration.

But, though no legislative limit is imposed on the tolls, or on the profits of the joint stock enterprise, still the two cases are widely and obviously different; for, in the case of a joint stock company, the land used for the undertaking may produce profit to the company, and, on that ground, would be clearly rateable. And, even if the limits of profit be fixed by the Legislature by imposing a maximum of tolls, still, in the case of a commercial joint stock company, whatever margin of profit is left to the shareholders over and above the ordinary rate of interest on floating capital, confers a rateable value on the land.

On this principle and to this extent it is that a railway or any other joint stock company is rateable in respect of its occupation of land. You take the gross income, and deduct expenses, including in the deductions not only interest on the floating capital, but even tenants' profits thereon; and what is left after these deductions is profit to the shareholders, and that profit constitutes the rateable value of the railway. No one ever heard of augmenting the rateable value of a railway or other property by the sum payable as principal or interest on its debentures. What the shareholders receive for their profit derived from the occupation of the land forms the theoretical rent, and, therefore, the rateable value of the land, not what the creditors receive for their debts or interest.

In the Liverpool Docks there are no shareholders, and no profit can ever be received by any one; all that can be done is to * 496 keep down interest and pay the debts, neither * of which payments constitutes profit to any one. Whatever proportion of the tolls is not wanted for this purpose must, as already observed, be immediately taken off.

However, in a case of this nature, probably authority rather than general reasoning ought to decide the question. I do not understand your Lordships to ask, and, therefore, it would be officious and presumptuous to express, any opinion on the effect of the

precedents cited, in binding your Lordships as the supreme tribunal. But I conceive that a Judge sitting either in one of the superior Courts of law, or even in the Exchequer Chamber, would consider himself concluded by authority in answering your Lordships' first question. And for confirmation I venture to refer your Lordships to Mr. Justice Crompton's language as to the effect of the decisions in pronouncing his judgment in the Court of Exchequer Chamber. He says, "with regard to the former decisions, I think that neither a Court of co-ordinate jurisdiction nor a Court of error ought to interfere in such a case." And, independently of the respect due by our system of law to precedent, a Judge would have to consider some of the consequences which must follow from adopting, at this late period, a new construction of the Statute of Elizabeth.

If a dedication to public purposes can be consistent with rateability, then, for the future, public hospitals, like St. Bartholomew's Hospital, St. George's Hospital, the London Hospital, St. Thomas's Hospital, and other establishments of the like nature in the metropolis and throughout the kingdom, with a multitude of other public charities, become at once subject to poor rates. Lunatic asylums, like St. Luke's or Bethlehem in the metropolis, and county lunatic asylums, also become assessable at their letting value; though in many instances the exemption *of *497 such institutions is recognized by Acts of Parliament, providing that land taken for the purpose shall retain its rateability to the extent of the value of the land without the buildings upon it. Churches and chapels (but for the recent statute) would, even where the pews are not let, have become rateable; for property is to be rated, not at what a tenant does give, but at what he would give for it in its actual condition (6 & 7 Wm. 4, c. 96). County jails, county reformatories, county Courts, and Courts of justice, not only in counties and cities, but in the metropolis also (not indeed in Westminster Hall, because that is one of the Queen's palaces), may become rateable. The property of the Crown in the occupation of the Crown will, no doubt, still be protected from rateability; but old questions now at rest will reappear as to other buildings occupied for public purposes, like the Horse Guards, the Admiralty, many buildings and residences at Portsmouth, Plymouth, Chatham, Milford Haven, and Greenwich, the British Museum, the National Gallery, Greenwich Hospital, the Custom

House, the General Post-Office, burial-grounds, many of the apartments in Somerset House, the premises occupied by the Poor Law Commissioners and other public bodies, public bridges, public turnpike roads, and the soil of many navigable rivers, if not of public highways themselves. In many of these instances money has been expended and money borrowed on the faith of precedent, the law having been considered as settled by its authorised expounders for so many years.

In the case now before your Lordships, as pointed out by Mr. Justice Hill in the Court of Exchequer Chamber, new docks have been constructed, and large sums of money borrowed on the faith of the decisions in this and other cases.

If the fact that the indebtedness of the trustees and
 * 498 * the application of the revenues to the payment of principal and interest makes them liable to be rated, then, as I have already said, I think the principles on which the railways and other joint stock enterprises throughout the kingdom have hitherto been rated will be unsettled.

In answer to your Lordships' second question, if at the time of the passing of the Acts enumerated in the question, it had been clear on authority and principle that the Liverpool Docks were rateable, then, I think the words contained in the sections referred to would not have exempted them from rateability.

But that is almost an impossible supposition ; for, had that been so, such enactments could never have found their way into a succession of statutes. I conceive that these enactments are to be read, like every other written instrument, with reference to the existing and surrounding facts. Those facts are, that from the time of the first establishment of the docks in the reign of Queen Anne, they had never been attempted to be rated, except on two occasions, on both of which occasions they had been pronounced exempt from rates by the Court of Queen's Bench. Those two decisions had been acquiesced in, and acted on for fifty years since the first, and thirty years since the last decision. No one can doubt, I think, that the successive penmen who drew the Acts, and all the parties to them, the board, the corporation, and the several parishes, took it to be clear, first, that an occupation not beneficial was not rateable, and secondly, that the docks (as distinguished from the warehouses) were not rateable on that ground. The opinion of the draughtsman of itself goes for little

or nothing ; but that opinion (in the presence of parties interested to dispute it) passed unchallenged five times through both Houses of Parliament. I think that circumstance amounts to a recognition * by Parliament of the law, that a beneficial * 499 occupation is necessary to rateability, and that the occupation of these docks by the Mersey board is not beneficial. It will, moreover, be observed that these Acts are not mere private Acts but public Acts, and not merely public in a technical sense, but upon a matter affecting the general public.

I think further, that the enactments disclose evidence of a bargain to which was needed and obtained the sanction of Parliament between 1st, the lenders of money ; 2d, the trustees and their predecessors in estate ; 3d, the parochial authorities of Liverpool ; and, 4th, the general public ; the effect of which bargain is that a certain portion of the property is to be rateable, and the residue not rateable. And that opinion seems to have been entertained by the Court of Exchequer Chamber.

I may add in conclusion, that the Court of Queen's Bench twice, and the last time after argument before four of the most eminent Judges who ever sat in that Court, had held these docks not rateable. And at this moment there stand the unanimous decisions of the Court of King's Bench in 1827 ; the unanimous decision of the Court of Common Pleas in 1862 ; and the unanimous decision of the Court of Exchequer Chamber in Error from the Common Pleas, — to the same effect.

In answer to your Lordships' third question, I am of opinion that the Act 20 & 21 Vict. c. 162 (§§ 26, 27), does not impose on the board any liability to poor rates, which, but for those clauses, would not exist.

The words would seem, *prima facie*, to regard charges or liabilities upon the land, such as debts, and perhaps easements. It was stated at your Lordships' bar that there are from twenty to twenty-four charges on the land, properly so called, and independent of poor rates, to which the * words in that sense * 500 would be applicable. But the poor rate, which, as I have already reminded your Lordships, originally affected personal property in the same way as real property, has repeatedly been held to be no charge on the land at all, but only on the person who occupies, in respect of the profits of his occupation. *Case v.*

Stephens,¹ *Theed v. Starkey*,² *Earl of Bute v. Grindall*,³ *Rowls v. Gells*.⁴

Moreover, the poor rate is a personal charge which exists or does not exist, according to the character of the occupier, as he is or is not a person liable to be rated. Suppose these general words in a grant to the Crown, or in a deed conveying land to trustees of a Court of justice, or of a church, it is plain that they would not impose on the grantee a liability to poor rate if he were exempt from rates. Or suppose them to exist in a statutable conveyance to the Crown, to which the Crown is a party, e. g. for fortifications; or in a statutable conveyance to any other clearly exempted occupier; I conceive that the words would not impose poor rates on occupiers not otherwise liable to pay.

Again, the Act of the following year, 21 & 22 Vict. c. 90, § 3, while incorporating the General Lands Clauses Act, excepts section 133 of that general Act, which excepted section provides for the preservation of the liability to poor rates and land tax in certain cases. But section 5 of the Local Act preserves the land tax, but is silent as to the poor rate; showing, as I conceive, that the Legislature intended to preserve the land tax, but not the poor rate.

Lastly, the Act 20 & 21 Vict. is an Act for consolidating
 * 501 * the docks at Liverpool and Birkenhead into one estate, and vesting the control of them in one public trust; and it would be singular if one portion of the property should be rateable, and one not rateable, under precisely similar circumstances. And this observation is strengthened by remembering that where such a distinction exists (as in the case of the warehouses), it is created by express words.

1865. June 22.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, the questions raised in this appeal depend in a great measure on the inquiry, What is the occupation of real property which is liable to be rated under the 1st section of the Act of the 43d Elizabeth, c. 2?

Independently of the decided cases, several of which are irreconcilable with each other, it would seem to be easy to answer this inquiry; and having regard to the Parochial Assessment Act (6 & 7 Wm. 4, c. 96) it may be said in answer, that "occupation" to

¹ Fitz. 298.

² 8 Mod. 314.

³ 2 H. Bl. 265.

⁴ Cowp. 453.

be rateable must be of property yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent.

It is in this sense that I understand the words "beneficial occupation," wherever it is said that to support a rate the occupation must be a beneficial one. For, on principle, it is by no means necessary that the occupation should be beneficial to the occupiers. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings.

The only occupier exempt from the operation of the Act is the king, because he is not named in the statute, and the direct and immediate servants of the Crown, * whose occupation * 502 is the occupation of the Crown itself, also come within the exemption. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable; so also trustees who are in law the tenants or occupiers of valuable property upon trust for charitable purposes, such as hospitals, or lunatic asylums, are, in principle, rateable, notwithstanding that the buildings are actually occupied by paupers who are sick or insane.

If the matter were *res integra* I could not concur in the decision of Lord Mansfield in the case of St. Luke's Hospital,¹ in which he is reported to have said that mere trustees cannot be esteemed occupiers or rated as lessees, or with his conclusion in the case of *The King v. St. Bartholomew's*,² but with a slight verbal alteration, I entirely agree with the remark of the learned Judges in the present case, that if Lord Mansfield meant that the persons in the legal occupation of valuable property are not rateable, if they occupy in a merely fiduciary character, it is a position which cannot be maintained.

To these observations and decisions of Lord Mansfield, that which appears to me to be the erroneous doctrine of several subsequent decisions is to be attributed.

This is plain on an examination of Lord Kenyon's judgment in the subsequent case of *The King v. The Commissioners of Salter's Load Sluice*.³ Lord Kenyon refers to the decision in the case of St. Luke's Hospital, and adopts the position that trustees who have

¹ 2 Burr. 1053.

² 4 Burr. 2485.

³ 4 T. R. 730.

a bare naked trust not coupled with any interest, are not liable to be rated, and he used language which, with the decisions of Lord

Mansfield, has introduced the notion that, if valuable

* 503 * property be in the possession of trustees, who are bound to apply the whole of the proceeds to public, but not government purposes, that is in works or purposes for the better accommodation or use of the public, they are not liable to be rated.

There is nothing in the Act of Elizabeth, or in the reason of the thing, to warrant this conclusion. No exemption is thereby given to charity or to public purposes beyond that which is strictly involved in the position that the Crown is not bound by the Act ; and it is a remarkable fact, that whenever these opinions of Lord Mansfield and Lord Kenyon have not been presented to the Court of Queen's Bench, the Judges have adopted the correct view of the statute. Thus in *The King v Liverpool*,¹ decided in the year 1823, and the case of *The King v The Trustees of the Weaver Navigation*,² decided in 1827, *The Salter's Load Sluice Case* was cited and relied on, and the Court of Queen's Bench adopted the language of Lord Kenyon, and followed his decision. But in the case of *The Governors of the Bristol Poor v. Wait*,³ decided in 1836, *The Salter's Load Sluice Case* does not appear to have been referred to, and the Court recurred to the correct view of the Statute of Elizabeth, and held that the governors of the Bristol poor, who had taken some buildings and land on lease for the occupation of their poor, although they were bare trustees, and held for a public purpose only, were such occupiers of property as to be liable to be rated to the poor. This case in its turn has been followed in other decisions as an authority, and it might have been supposed that the authority of *The Salter's Load Sluice Case* and its two satellites, *The King v. Liverpool*, and *The King v. The Trustees of the Weaver*

* 504 *Navigation*, had come to an end. But in the year 1839, * the Court of Queen's Bench in the case *The Queen v. The Corporation of Liverpool*,⁴ returned to its old allegiance, and again set up the authority of *The King v. Liverpool*, and *The King v. The Weaver Navigation*. This last case of *The Queen v. The Corporation of Liverpool*, was decided on the principle that since the Municipal Corporation Act, the property of a municipal corporation is

¹ 7 B. & C. 61.

² 5 A. & E. 1.

³ 7 B. & C. 70, n. (c).

⁴ 9 A. & E. 435.

held upon trust for the purposes of the borough fund, and therefore that the Corporation of Liverpool was a bare trustee of the property in question, for public purposes. The mischief of this decision was remedied by the Act of 4 & 5 Vict. c. 48, but unfortunately that Act did not declare the law.

Some subsequent decisions of the Court of Queen's Bench have been marked with much timidity. They have in effect departed from the grounds of the decisions in *The Salter's Load Sluice Case*, and its attendant cases, but have at the same time attempted by very questionable distinctions, to save whole the authority of those cases. Thus in the cases of *The Queen v Badcock*,¹ *The Queen v. Longwood*,² there is an attempt to distinguish between the interest of the unlimited public, and the interest of the public limited by the bounds of a county, borough, or parish.

At last in the case of *The Tyne Improvement Commissioners v. Chirton*,³ the Court of Queen's Bench recurred to that, which is in my opinion the true principle, namely, that the only ground of exemption from the Statute of Elizabeth is that which is furnished by the rule, that the sovereign is not bound by that statute, and that consequently when valuable property (that is, property capable of yielding a net rent above what is required for *its *505 maintenance) is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.

If this be the true criterion of exemption from rateability where the property is valuable, it is clear that the Mersey Docks are liable to be rated.

In this country many works tending greatly to the convenience and benefit of the public, and in that sense public works, are the results and creation of private enterprise, being made or performed by money subscribed by the public on the terms, or in the hope, of receiving such interest out of the proceeds of the works, as will, in the judgment of the subscribers, make the investment a profitable one. Such is the condition of the Mersey Docks, which are in truth property used and occupied for the profit and benefit of a number of persons, and it is the same thing in substance as if the docks had been demised by the subscribers to the trustees on the

¹ 6 Q. B. 787.

² 13 Q. B. 116.

³ 1 Ellis & E. 516.

terms of maintaining the docks, and paying to the subscribers a rent equivalent to the interest on their bonds.

I am, therefore, clearly of the same opinion with the majority of the learned Judges, that the trustees constituting the "Mersey Docks and Harbour Board" are occupiers of the docks and harbour within the meaning of the word "occupier" in the Act of Elizabeth.

The answer to the second question put to the learned Judges, is in effect a mere consequence of the answer to the first question ; for it cannot be pretended that the Statute of Elizabeth has been repealed either expressly or impliedly by any of the statutes which apply to the Liverpool Docks, or that the liability of the * 506 trustees as * occupiers, which is the result of the true interpretation of the Act of Elizabeth, has been discharged or altered by any thing contained in the local statutes. On this head it is unnecessary to say more than that I concur with the observations of the majority of the Judges in their elaborate opinion delivered by Mr. Justice Blackburn.

The result is that I humbly move your Lordships to reverse the order of the Court of Exchequer Chamber, in the case of *Jones v. The Mersey Docks and Harbour Board*, but to affirm it in the case of *The Mersey Docks and Harbour Board v. Cameron*.

LORD CRANWORTH. — My Lords, I concur with my noble and learned friend in thinking that judgment ought to be given for the plaintiffs in error.

I have given full attention to the opinions of the learned Judges who assisted us at the hearing, and concurring, as I do, in that delivered by Mr. Justice Blackburn on behalf of himself and four of the other five Judges, I do not feel it necessary to go into the question at length ; that very able opinion seems to me to exhaust the subject.

By the Statute of Elizabeth the overseers are directed to raise the money necessary for the relief of impotent poor, by taxation, among others, of every occupier of land in the parish.

That the defendants in error are occupiers of land in the parish of Liverpool cannot be doubted ; and so, unless there be something to exempt them, they are rateable.

The argument on their behalf has been that, though they are occupiers, their occupation is not a beneficial occupation ; and

the statute, it was contended, contemplated *only such an * 507 occupation as is beneficial to the occupier or to some other person or persons for whose behoof the occupier is occupying.

If by beneficial occupation is meant any occupation of something valuable, something in its own nature beneficial to some one, I think it is fair to consider that word as impliedly included in the statute. It was not meant to impose the duty of contributing to the relief of the poor, or any one merely because he might be the occupier of a barren rock, neither yielding nor capable of yielding any profit from its occupation.

But I can discover nothing either in the words or in the spirit of the Act exempting from liability the occupier of valuable property, merely because the profits of the occupation are not to be enjoyed by him or by any on whose behoof he is occupying, but are to be devoted to the benefit of the public.

In the opinion of the five Judges, delivered by Mr. Justice Blackburn, that learned Judge has traced with great care and accuracy, the progress of the decisions on this subject; and I should be merely wasting the time of the House, if I were to proceed to go over again what has been so well done by him. The Court seems to me to have fallen into error in the time of Lord Kenyon, if not in that of Lord Mansfield, in proceedings which unfortunately were incapable of being questioned in a Court of error. The decisions so made were followed in similar proceedings in the time of Lord Ellenborough and Lord Tenterden; the doctrine on which they rested was shaken in some cases which occurred when Lord Denman was Chief Justice, and eventually were in substance overruled when Lord Campbell presided in the Court of Queen's Bench.

In these circumstances, thinking as I do that there is * nothing in the Statute of Elizabeth expressly or impliedly * 508 exempting from rateability the occupiers of valuable property, merely because the benefit of the occupation is to go to the public, I think your Lordships ought not to consider yourselves fettered by any decisions of the Courts below, but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced.

I therefore concur in the motion of my noble and learned friend on the Woolsack.

To avoid all misconception I wish to add that there are certain cases to which the observations I have made do not apply.

The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated ; and I conceive that it is from a confusion between property occupied for public purposes, and property occupied by servants of the Crown, that this mistake has arisen. This principle exempts from rates not only royal palaces but also the offices of the Secretaries of State, the Horse Guards, the Post-Office, and many similar buildings. On the same ground police Courts, county Courts, and even county buildings occupied as lodgings at the assizes for the Judges have been held exempt. These decisions however have all gone on the ground more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country. In none of these cases was exemption

conceded on the ground contended for in the present case,
 * 509 and I * cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown, or the Crown through its servants, were directly concerned.

LORD CHELMSFORD. — My Lords, it is impossible in entering upon the consideration of these appeals, to refrain from an expression of surprise that there should arise at the present day, after more than two centuries and a half from the time of the passing of the Act, a necessity for interpreting any part of the 43d Elizabeth ; and yet from the numerous cases which have been cited in the argument at your Lordships' bar, it is evident that the exact meaning of the important word " occupier " in the rating clause of that Act, must be regarded as hitherto an unsettled question.

Those who have to establish the liability of the docks to be rated to the poor rate, have with respect to the Liverpool Docks, to contend against the authority of a decision probably in 1806, but certainly in 1827, upon the very subject in question in one of the appeals. The latter decision was expressly founded upon a case determined more than thirty years before, and which has since

been regarded and acted upon as an unquestionable authority. Under these circumstances the counsel for the parishes might expect that the House would feel the same reluctance to disturb those decisions, as was expressed by Lord Chief Justice Tindal in *Crease v. Sawle*,¹ and would say with him, "It would be extremely inconvenient and indeed mischievous to overrule a class of cases which have been much discussed and sanctioned by eminent

*Judges, and which are now constantly acted upon, because *510 we might not feel perfectly satisfied with the reasons assigned for their decision ; if we could permit ourselves to disregard these authorities on that account, we might feel disposed on the same ground to reject others which have put a construction on the 43d Elizabeth, c. 2, which we were by no means sure it ought to bear, if we were now for the first time called upon to explain the meaning of its language."

Mr. Justice Crompton, in delivering the judgment of the Court of Exchequer Chamber, in the case of *The Mersey Docks and Harbour Board v. Jones and Others*, said: "With reference to the former decisions, I think that neither a Court of co-ordinate jurisdiction nor a Court of error ought to interfere in such a case ; if there is any hardship it must be left to the Legislature." By this last observation the learned Judge seems to have considered that this House as well as the Courts of original and appellate jurisdiction ought to yield implicitly to the authority of long-established decisions ; but the same reasons for acquiescence do not apply to different tribunals. The Courts rightly abstain from overruling cases which have been long established, because if they did so they would only disturb, without finally settling, the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to examine the foundation upon which they rest. That would not, in my opinion, have been the duty of your Lordships even if the current of the decisions had been uniform ; but as various cases have been decided, which, with all the *endeavours to reconcile them, must still be regarded as *511 conflicting and contradictory, it is absolutely necessary to determine what, for the future, shall be considered to be the law

¹ 2 Q. B. 885.

with reference to rating docks and works of a similar character.

The 43d Elizabeth, c. 2, enacts "that the overseers are to raise by taxation of every inhabitant, &c. and of every occupier of lands, houses, &c. such competent sums as they shall think fit, according to the ability of the parish," the requisite fund for the purposes of the Act.

The words "to rate in such sum as they shall think fit" do not mean, as Lord Chief Justice Tindal says in *Marshall v. Pitman*,¹ that they are to have a power to rate arbitrarily, but "to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property"; or as was said in *Earby's Case*,² the overseers are to make their taxations and assessments well and truly, and in an equal manner, according to the visible estates, real and personal, of the inhabitants within this town.

Prima facie, therefore, a liability to the rate would seem to attach upon any occupation from which benefit is derived; and no occupier can claim an exemption unless he can find it in the Act itself, or it arises from some principle of law applicable to all cases.

With respect to exemption arising from the Act itself, it is obvious that as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation he has no ability in respect of it, and consequently cannot be rateable. The other exemption, which does arise from the Act itself, but which

is founded on a general principle of law, applies only to the

* 512 Crown, * which, not being named in the Act, is not bound by it.

I am unable to find any ground of exemption from liability to the poor rate, either in the Act itself, or in any principle of law apart from the Act, except the two which I have mentioned, and there is nothing to indicate the intention of the Legislature that lands and houses occupied for, what in some of the cases is rather loosely called "public purposes," as contradistinguished from private benefit, should not be liable to the rate.

Lord Campbell, in the case of the *Birkenhead Dock Trustees v. Birkenhead Overseers*,³ says that the exemption on the ground of public purposes takes its origin from the marginal note to the

¹ 9 Bing. 601.

² 2 Bulst. 354.

³ 2 Ellis & B. 157.

report of the case of *The King v. Commissioners of Salter's Load Sluice*.¹ If this is so, it is a remarkable fact, that in following that case as an authority, the Courts should have been misled by confining their attention to the marginal abstract, which certainly conveys a very imperfect, if not an inaccurate, idea of the grounds of the decision. The term "public purposes" is only employed by Lord Kenyon in *The Salter's Load Sluice Case* incidentally. The reason given for the judgment is the absence of beneficial occupation. His Lordship says, "The commissioners have a bare naked trust, not coupled with any interest." And again, "upon the ground on which the Court proceeded in *The King v. St. Luke's Hospital*, there was no occupier" (by which he must have meant no beneficial occupier, for he adds), "The commissioners were mere trustees to superintend the execution of the Act, without any personal advantage." This reference to the case of *St.*

Luke's Hospital shows that the leading idea in the *mind *518 of the Court was the want of a beneficial occupier, although there does not seem to be a very close analogy between the case of an hospital supported by voluntary subscriptions, from which no person who could be regarded as an occupier derived any pecuniary benefit, and the receipt of tolls as a compulsory incident to the occupation by the commissioners of "The Salter's Load Sluice."

The first case in which an occupation for "public purposes" was expressly stated as the ground of exemption from liability to poor rate is *The King v. Trustees of the River Weaver Navigation*,² to which the principle of the decision in *The King v. Inhabitants of Liverpool* (the decision brought into question by this appeal) was held to be applicable.

In the case of *The King v. Liverpool*, Lord Tenterden proceeds upon the ground of there being no beneficial occupation, with respect to which he said the case of *The King v. Commissioners of Salter's Load Sluice* is decisive. But in *The King v. Trustees of Weaver Navigation*, Mr. Justice Bayley said, "the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes, and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees." In *The Queen v. The Mayor of Liverpool*,³ the Judges followed the cases of *The King*

¹ 4 T. R. 730.

² 7 B. & C. 70, n. (c).

³ 9 A. & E. 435.

v. *Liverpool*, and *The King v. Weaver Navigation*, without expressing any opinion as to the grounds of these decisions, observing,

“That they felt it to be impossible substantially to distinguish the case before them from those cases, and * especially from the latter, and that if they found the principle settled by decisions already made, they felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences to question or weaken their authority. In the case of *The Queen v. Exminster*,¹ they adhered to their decision in *The Queen v. Mayor of Liverpool* without any further explanation of the grounds of their judgment.

But in a more recent case, *The Queen v. St. George's, Southwark*,² Lord Denman said, “Whether a person is rated as occupier, holder, or possessor of the premises, or as using them, the occupation, holding, possessing or using them must be beneficial to the parties so rated. It has been settled by several cases that the possessors, or occupiers as trustees, of property otherwise rateable, the profits of which they were bound by Act of Parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property.” Now, although Lord Denman in the case of *The Queen v. Mayor, &c. of Liverpool* seems to hint at some distinction between the cases of *The King v. Liverpool* and *The King v. Trustees of Weaver Navigation*, yet it would appear (especially from his last-mentioned observations) that he considered them to rest upon the same foundation, and that the counsel on both sides at your Lordships’ bar were correct in saying that there was no case decided upon the ground of public purposes which was not resolvable into a beneficial occupation. But if this is so, it will be impossible to accept the explanation by which decisions apparently inconsistent with the judgment in *The King v. Salter's Load Sluice* and the cases which followed it, have been attempted to be reconciled with them.

*515 *To these cases it is necessary now to turn. The first of them which broke in upon the series of decisions hitherto considered, is the case of the *Governors of the Poor of Bristol v. Wait*;³ in deciding this case as they did, the Judges were probably not aware that they were disregarding the authority of previous decisions, as the *Salter's Load Sluice Case*, and the other cases founded upon it are not noticed in the argument or in the judgment.

¹ 12 A. & E. 2.

² 10 Q. B. 864.

³ 5 A. & E. 1.

But in *The King v. Guardians of the Wallingford Union*,¹ where those cases were cited, the Court followed the case of the *Governors of the Poor of Bristol v. Wait*, without any attempt to reconcile it with what had been previously decided.

In the case of *The Queen v. Badcock*,² however, Lord Denman in giving judgment reviewed the authorities which appeared to be conflicting; on the one side the series which followed *The King v. The Inhabitants of Liverpool*, and on the other that which commenced with the *Governors of the Poor of Bristol v. Wait*, and observed that in all the first class the public as such, unlimited by the bounds of county, borough, or parish, had a substantial and direct interest in the benefit which the application of the funds produced: in the latter the ratepayers or at most the inhabitants of certain parishes were alone concerned in the benefit, direct or indirect. This distinction was approved of and adopted by Mr. Justice Coleridge in *The Queen v. Harrogate*.³

The attempt thus to reconcile the discordant decisions, will be regarded as having been completely unsuccessful when it appears that in the first class, instead of all the cases being instances in which the public at large "unlimited by the bounds of county, borough or parish," had *an interest, we find the *516 case of *The King v. Trustees of the Weaver Navigation*, in which the surplus funds were applied for the general purposes of the county of Chester, and of *The King v. Mayor of Liverpool*, and *The Queen v. Exminster*, in which the public beyond the bounds of the borough had a benefit produced by the application of the funds; and the distinction fails altogether if the term "public purposes," as distinguished from "private purposes," is to be resolved into the question of beneficial occupation, because it would then appear to be immaterial whether the public purposes which exclude the idea of private benefit were of a local or of a general character.

The desire of the Courts however not to be bound by the former decisions, and yet not to be compelled expressly to overrule them, is exhibited in a very striking manner in the case of *The Queen v. Commissioners of Harrogate*,⁴ where it was held that in order to exempt property from liability to poor rate on the ground of its occupation for public purposes, the benefit must be exclusively public, and that if the occupation was in some degree beneficial to the

¹ 10 A. & E. 259.² 6 Q. B. 787.³ 15 Q. B. 1020.⁴ 15 Q. B. 1012.

whole public, yielding additional benefit also to a limited district or community, the property was rateable ; as if it could make any difference in point of principle, when the occupation is for public purposes, that one portion of the public derives a greater benefit from the application of the funds produced than the rest.

After these fruitless endeavours to reconcile the decisions, a case arose in which it seemed absolutely necessary to determine whether

The King v. Inhabitants of Liverpool, and the cases which * 517 followed it, were to be * submitted to as authorities for the future, or were to be set aside and disregarded. In the case of *The Trustees of the Birkenhead Docks v. The Overseers of Birkenhead*,¹ the question to be decided was whether the Commissioners of the Birkenhead Docks were liable in respect of their occupation to be rated to the poor rate ; it certainly requires some ingenuity to discover any difference between the Birkenhead Docks and the Liverpool Docks, the latter of which had been decided, in the case of *The King v. Inhabitants of Liverpool*, not to be rateable. But Lord Campbell held that the cases were distinguishable ; he said that “ the decision in *The King v. Commissioners of Salter’s Load* *Sluice* could be rested only on the clause in the local Act which directed the tolls to be applied and disposed of for the several uses and purposes of the said Act, and to no other use or purpose whatsoever. The question was whether this amounted to a prohibition to apply the tolls to the payment of the poor rate,” and adopting this construction he added, “ we think that the decision in the *Liverpool Case* can only be supported by similar reasoning.”

It is clear, however, that the cases in question were not decided on any such ground, and it could have been assumed by Lord Campbell only from his desire to escape from the necessity of submitting to them, by suggesting a distinction without denying their authority. That distinction was that in the *Birkenhead Case* the obligation to lower the tolls, which was much relied upon in the *Liverpool Case*, was entirely wanting. It might have been supposed that, the decision of the *Birkenhead Case* having proceeded upon this ground, when the subsequent case of *The Tyne*

* 518 *Improvement Commissioners v. Overseers of Chirton*,² was brought before Lord Campbell and the Court of Queen’s Bench, in which case the local Acts for making a dock expressly required the commissioners “ in the event of any surplus remain-

¹ 2 Ellis & B. 148.

² 1 Ellis & E. 516.

ing after the appropriation of the rates to the purposes of the Act, to lower the rates to the extent of such surplus," he would have adhered to the distinction, and have held the case to be governed by the authority of *The King v. Inhabitants of Liverpool*; but instead of taking this course, he said that "to hold the dock exempt from rateability they should have to overrule *Birkenhead Dock Trustees v. Birkenhead Overseers*, and that the only distinction between the cases was that in the *Birkenhead Case* the commissioners had power to raise the rates again after having reduced them."

In this unsatisfactory state of the authorities it is evident that the two classes of decisions which have been subjected to this examination cannot stand together, and that it is necessary for your Lordships to determine which of them is agreeable to law. It must not be overlooked that in favour of the exemption of the docks from liability to poor rate, there is the recital in the Act of 4 & 5 Vict. c. 48, which strongly indicates the opinion of the Legislature that the cases which had held the property of municipal corporations not to be liable to poor rate had been rightly decided. But as Lord Campbell said in *The Queen v. Inhabitants of Haughton*,¹ "a mere recital in an Act of Parliament, either of fact or law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital." The question, of course, depends upon the true meaning of the word "occupier" in the 43d Elizabeth.

* The words of the Act are as general as possible, "every *518 occupier according to his ability." And Lord Denman in the case of *The Governors of the Poor of Bristol v. Wait*,² seems to give a correct description of the effect of these words, when, after adverting to the meaning of the term "beneficial occupation," he says, "without affecting the precision of an exact definition, it would probably be nearer the truth to say, that a presumptive liability arising from occupation, is to be explained away in each case." It is impossible not to agree with the observations made by his Lordship in the case of *The Queen v. Sterry*³ that "no one can review the numerous decisions" (which cases somewhat like the one then before him had occasioned) "without regretting that the Court was ever induced to depart from the simple test which the subject matter of occupation would in every

¹ 1 Ellis & B. 516.

² 5 A. & E. 1.

³ 12 A. & E. 92.

case have afforded ; whether the occupation was in respect of private or public or charitable purposes, it would have been wiser to disregard it, and whenever the subject matter was found productive to any one, to rate the actual occupant in respect of that produce." I cannot help thinking that the test here suggested was the one intended by the Legislature ; by the Act, the taxation is to be on every occupier " according to the ability of the parish " ; the productive occupation of the several occupiers within the parish make up the aggregate ability. If an occupier derives no benefit of any description from his occupation it forms no part of the general ability of the parish, but if it is productive (although not profitable) there is nothing in the Act which requires the overseers to follow the produce in its subsequent application.

* 520 The receipt of it constitutes * the visible ability of the occupier ; as was said by Lord Tenterden in *The King v. Inhabitants of St. Giles, York*,¹ " If any profit be made, the application of it, when made, is immaterial as to the question of rateability." This seems to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen.

It is to be observed that the term " beneficial occupation " is nowhere to be found in the Act of Elizabeth, and it must have been used in the different cases as synonymous with " ability." In this sense the decisions with regard to St. Luke's and St. Bartholomew's Hospitals, and to chapels and rectory houses, where no pew rents are received, are perfectly intelligible. In none of them could any person, in the character of occupier, be said to derive any benefit from the occupation. But that the absence of private benefit is no ground of exemption, appears from the cases in which trustees of chapels who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable. And in the recent case of *The Queen v. Sterry*,² the trustees of a school purchased from funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the school without an annual payment of 12l., although the average annual expense of each was 20l.

The case of *Salter's Load Sluice* gave the key note to all the

¹ 3 B. & Ad. 579.

² 12 A. & E. 84.

subsequent decisions, which held that the *prima facie* liability of an occupier no longer existed, when it was shown that the profits connected with his occupation * were applicable to * 521 public purposes. Lord Kenyon, in founding his judgment upon *The King v. St. Luke's Hospital*, must have intended to decide that in the case before him there was no beneficial occupier, although he did not advert to the distinction that in the case of *St. Luke's* there was nothing received by any one by reason of the occupation, while the commissioners of the Salter's Load Sluice were empowered to take tolls for the navigation which was vested in them.

The exemption of an occupier whose occupation is applicable to public purposes, was thus almost incidentally introduced, and having been so, it was accepted without much consideration in the subsequent cases. At last some decisions having taken place which were hard to be reconciled with each other, it became necessary to define, with some precision, the true principle which ought to govern cases of this description. The distinction was then proposed between general and local public purposes. The difficulty, nay, impossibility, of reconciling the cases by a distinction of this sort, is plain. If the ability of the occupier means the personal benefit derived from his occupation, it is as much excluded where the profits of his occupation are applicable to limited public purposes, as where they are to be applied to the benefit of the public at large.

I am of opinion that under the words of the 48d Elizabeth, every occupier of a tenement yielding profit, is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance.

Having thus expressed my opinion that the Mersey trustees are liable to be rated for the Liverpool as well as for the Birk-head docks, it is unnecessary to consider * the effect of * 522 the different Acts by which the trustees were expressly made liable to parochial rates "in respect of warehouses to be built in like manner, as the same are or would be payable in respect of warehouses, the occupancy of which is beneficial." The provisions of these Acts certainly appear to indicate the opinion of the Legislature, that without them the warehouses would have been exempt from liability to poor rate as part of the docks enjoy-

ing that exemption. But if this liability existed before, the Acts can have no effect in taking it away by mere implication.

It is quite true, as Mr. Justice Byles has said, that the Act of 20 & 21 Vict. having consolidated the docks at Liverpool and Birkenhead into one estate, and vested the control of them in one public trust, it would be singular if one portion of the property should be rateable, and one not rateable under precisely similar circumstances. This would be so if both the decisions appealed against, were to stand. The remark strikingly exhibits the impossibility of reconciling decisions which on the one hand have exempted the Liverpool Docks from liability to rate, and on the other have rendered the Birkenhead Docks liable to it.

By reversing the judgment in the case of the Liverpool Docks and by affirming the judgment in that of the Birkenhead Docks, the decisions will at last be brought into uniformity, and the Statute 43 Elizabeth will, in my opinion, receive its proper construction and have its consistent effect and operation.

LORD KINGSDOWN concurred.

Lords' Journals, 22d June, 1865.

*523 • LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO.

1865. March 31 ; April 3, 4.

The LEATHER CLOTH COMPANY (Limited), *Appellants*.

The AMERICAN LEATHER CLOTH COMPANY (Limited), *Respondents*.

Trade Marks Infringement.

A company purchased all the property, utensils, good-will of business, and trade marks, &c. of a manufacturer: this purchase would authorise the company, really carrying on business at the same place, to continue the use of the manufacturer's name and marks, so as to be protected therein against infringement of the same.

There may be a property in a trade mark which, on the sale of the right to manufacture the goods which it designates, may also be sold and transferred. *Semble*, a paper descriptive of a trade does not constitute a "trade mark."

Where an advertisement, or trade mark, states that which is not true, it cannot be made the subject of protection by the Court of Chancery.

Persons of the name of Crockett manufactured leather cloth, and put on it a stamp, describing it as manufactured by them at "New Jersey, U. S., and West Ham, Essex," and as being patented and being tanned. The appellants bought their manufactured articles, their materials for manufacture, good-will, and premises at West Ham, and their trade marks. *Semble*, that on such a purchase the continued use by the purchaser of Crockett's original bill was not a fraud on their part, and if the use of it had been infringed, it might have been protected.

But where in a stamp used by the defendants, the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs', that any person with reasonable care and observation must see the difference, and could not be misled into taking the one for the other :—

Held, that there had been no infringement.

THIS was an appeal against a decree of Lord Chancellor Westbury, which had reversed a previous decree of Vice-Chancellor Wood.

The plaintiffs (and appellants) who constitute "The Leather Cloth Company (Limited)," complained in their * bill * 524 that the defendants, who constituted "The American Leather Cloth Company (Limited)" had illegally used their trade mark.

The facts on which the complaint proceeded were stated to be these : The manufacture of leather cloth or cotton wove fabric made to imitate leather, was an American invention. The manufacture was carried on at Newark, in the State of New Jersey, U. S., by J. R. and C. P. Crockett. Their agents in London were Messrs. Dodge and Brewster, merchants, of Coleman Street, whose partnership was dissolved in 1854, and another was constituted of Messrs. Dodge, Bacon, and Giandonati. In the same year, Bacon became a member of the firm of J. R. and C. P. Crockett. In October, 1855, the members of that firm, together with other persons, established in America a joint stock company, which was incorporated in the State of New Jersey, under the name of "The Crockett International Leather Cloth Company." Dodge, Bacon, and Company acted in England as the agents of this incorporated company ; the company obtained in England a patent for its manufacture, and used a stamp on its cloth, in the form of the first of the patterns subjoined.

The company manufactured much of its cloth at premises at West Ham in Essex, and continued to do so until 1857, when it was resolved to sell those premises. C. P. Crockett received a power of attorney for this purpose, and he sold to the appellants "the lease, buildings, machinery, tools, and fixtures belonging to the company at West Ham, situate at West Ham ; together with the trade marks and good-will of the business carried on there, and also all goods manufactured and unmanufactured, and in the process of

being manufactured, and all materials used for manufacturing, and other things at * West Ham ; and all patents issued in England or France, owned by the company, or to or in which the company was entitled or had any interest." The appellants' company, called "The Leather Cloth Company (Limited)," was formed to effectuate this purchase. The appellants claimed the exclusive right to use the stamp, or trade mark, which had before been used by the Crocketts.

Another company (the respondents' company) was in August, 1861, constituted in this country, called "The American Leather Cloth Company (Limited)," and incorporated under the Joint Stock Companies Act of 1856 ; it carried on business in the Kent Road, at premises formerly belonging to the private partnership of Dodge and Giandonati. This new company issued its bills with a stamp of the second pattern, represented in the preceding page.

It was to prevent the use of this form that the bill was filed. The case came on before Vice-Chancellor Wood, who thought that the stamp or form used by the defendants was a colourable imitation of that used by the plaintiffs, and so granted the injunction. On appeal to Lord Chancellor Westbury, his Lordship, on the grounds that the bill (or trade mark) of the plaintiffs did not truly represent the facts, but untruly pretended that the appellants' cloth was manufactured by Crocketts, was patented and was tanned, declared it not entitled to protection in equity, reversed his Honour's decision, and dismissed the bill, but without costs. This appeal was then brought.

Sir H. Cairns and *Mr. Dickinson*, for the appellants. — Though there may not be on the part of those who infringe a trade mark any positive intention to deceive, if the result is deceptive, the

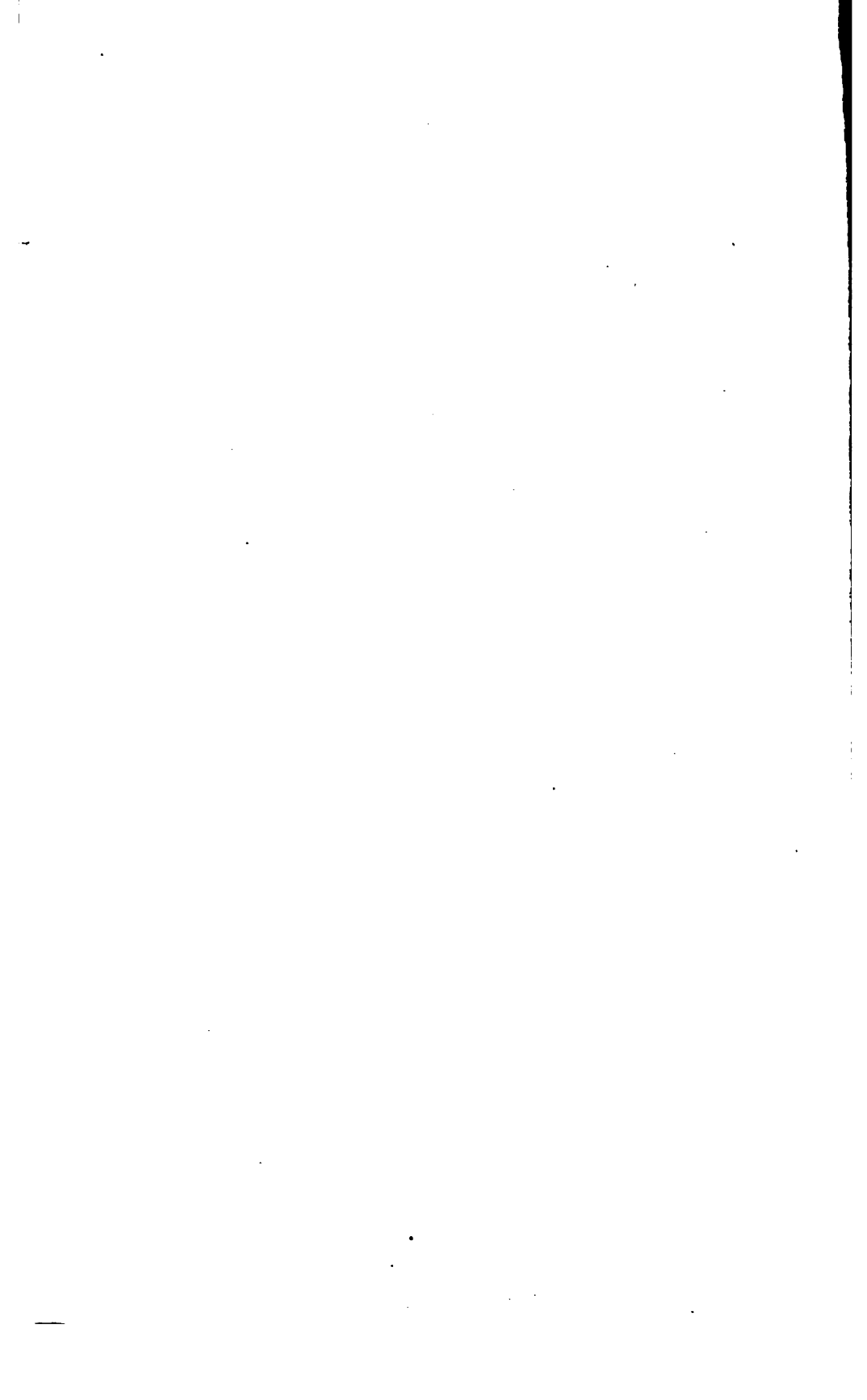
Court will interfere to restrain the use of that which occasions the deception. * That is the principle laid down

APPELLANT'S MARK.



RESPONDENT'S MARK.





in *Millington v. Fox*.¹ A colourable imitation of a trade mark is, in equity, a fraud which it is the especial duty of the Court to prevent. An injunction may be maintained against the seller of goods who has imitated the trade mark of another trader, even though those who bought them were aware that they were not of the plaintiff's manufacture, *Edelsten v. Edelsten*.² It may be admitted that, in this case, there are certain differences between the two trade marks, but there is a general resemblance between them, and the leading words in both are the same; any but a very cautious purchaser would be liable to be deceived. The appellants have a complete right to their trade mark, for they are the assignees of all the property and all the rights of the original patentees; no one has a right to imitate these marks.

In answer to the claim for the interference of the Court, the cases of *Pidding v. How*,³ and *Perry v. Truefitt*,⁴ will be cited. But each of these cases is inapplicable to the present. In *Pidding v. How*, the injunction was refused because the plaintiff had himself made false representations as to the article he sold, and was therefore held not entitled to ask for protection in respect of that article; and the same doctrine was laid down in *Perry v. Truefitt*, but it was there distinctly declared that the ground on which a Court of equity protects trade marks is, that it will not permit a party to sell his own goods as the goods of another. That declaration ought to be applied in this case, where there has not been any false representation whatever to prevent its application. On that point, *Perry v. Truefitt* proceeded on the principle laid down in *Millington v. Fox*,* and acted on at law in *Sykes v. Sykes*,⁵ *527 where a manufacturer had adopted a particular mark for his goods, to denote that they were manufactured by him, and the imitation of that mark by the defendant, who manufactured and sold goods of a similar kind, was held to be a good ground of action. [THE LORD CHANCELLOR. — In this case, to what does the word "manufactured" in this mark apply?] To "J. R. and C. P. Crockett." [LORD KINGSDOWN. — The injunction, then, is to be a declaration that the defendants have no right in any way to use the words "Crockett and Company," in reference to the manufacture of leather cloth?] It is to restrain them from selling, as the cloth of those manufacturers, cloth which the plaintiffs alone

* 3 Mylne & C. 338.

* 8 Sim. 477.

* 3 B. & C. 541.

* 1 De G., J. & S. 185.

* 6 Beav. 66.

possess the right to manufacture. The plaintiffs here stand in the same situation, and are possessed of the same rights as the Crocketts, whose rights and property in this country they purchased. They are in the same situation as were the executors in the case of *Croft v. Day*,¹ and can, like them, maintain the injunction. That case was a strong instance of the title obtained by the use of a name, for there the plaintiffs were only the executors of the original makers of the article, and the defendants were actually persons really bearing the names of Day and Martin; yet the defendants were restrained from using their own names in any manner that would have the appearance of presenting them to the public in their character of the original makers of the blacking. That principle was acted on in *Rodgers v. Nowill*.² So in *Morison v. Moat*,³ an injunction was granted to prevent the use of a name by which a medicine had become known to the public.

* 528 [THE LORD CHANCELLOR. — What evidence is there that the trade mark here was accepted in the market as that designating the goods manufactured by a particular house before the assignment to the appellants?] No direct evidence of that sort was produced, but if that was a material question of fact there ought to have been an issue to determine it. If there has been an accustomed mark, it must be treated as a mark recognised in the trade, *McAndrew v. Bassett*,⁴ where the word "Anatolia" was stamped upon liquorice, and was treated by Vice-Chancellor Wood as a trade mark, and his decree was confirmed on appeal by the Lord Chancellor. [THE LORD CHANCELLOR. — That is the case of a man who adopted the word as a trade mark for the first time; here is the case of an assignee of the mark; ought it not to be shown that the mark had been adopted and recognised by the trade?] If originally used by one man it became his property; being so, he could assign it, and his assignee would be entitled to all his rights; the use of the American Eagle alone would fix itself in the mind of the purchaser, and induce the belief that he was purchasing the article which under that symbol had acquired celebrity. It seems difficult to understand how the demand of the appellants here can be resisted, unless it is to be declared that a trade mark is to be no protection to the trader who has used it specially to designate certain goods of his manufacture.

¹ 7 Beav. 84. ² 6 Hare, 325. ³ 9 Hare, 241 4 N. R. (1864), 12, 123.

In order to maintain an application for an injunction, it is not necessary to prove the existence of fraud in the person who infringes it; but even if necessary, the close imitation here of the plaintiffs' mark is itself a sufficient indication of fraud. [THE LORD CHANCELLOR. — Can an advertiser's name be converted into a trade mark?] This * is not an advertisement, *529 but a trade mark; nor is the name all that has been imitated; all the leading features of the two marks are the same. It will perhaps be said that this cloth is represented as patented, when in fact the patent was at an end. The statement that the article is patented, made of an article which had been the subject of a patent, but of which the patent has expired, will not prevent the appellants from obtaining the protection of the Court, *Edelsten v. Vick*.¹ In like manner there is nothing in the objection that all the leather manufactured by the appellants is not tanned. They do manufacture it both tanned and untanned; and one of their largest customers always has it tanned; but it is not because a customer can choose to have it untanned that therefore protection is to be refused to the manufacturer.

Mr. Rolt and *Mr. Fischer*, for the respondents. — This is a mere advertisement and not a trade mark, and therefore is not within the case of *McAndrew v. Bassett*,² where a single word, "Anatolia," was used as a trade mark. If this stamped bill or statement is an advertisement, there is an end of the appellants' case. Then, again, the name of the appellants' company is not truly described, for it is not the "Crockett International Leather Cloth Company," which was an American company, but is an English company, formed of other persons. The 18 & 19 Vict. c. 133, sections 4 and 5, show that any advertisements issued by such a company must mention its name in legible characters, and a penalty is attached to the breach of this regulation. That regulation has not been complied with here. Now where * the law directs a thing *530 to be done, still more where it imposes a penalty for not doing it, the Court will not grant its assistance to any person who has disobeyed the provisions of the law, *Cope v. Rowlands*.³

There are two points in the law of protection of trade marks, which must be established before an injunction can be granted; first, conduct on the part of the plaintiff such as will entitle him to

¹ 11 Hare, 78.² 4 N. R. (1864), 12, 123.³ 2 M. & W. 149, 157.

protection ; secondly, there must be a strong degree of resemblance between one and the other thing, in order to establish the position of infringement. The only case which resembles the present is that of *Edelsten v. Vick*,¹ as to which it may be admitted that there may be circumstances in which a misrepresentation of fact shall not disentitle the plaintiff to protection ; but that case is not nearly so strong as the present. Other cases enforce the necessity of truth in the description.

In *Flavel v. Harrison*,² the plaintiff was refused protection by an injunction, because he had described the article as patented ("Flavel's Patent Kitchener") when it was not so. Again, the cloth here is represented as manufactured by Crockett & Co., and as being tanned leather cloth, neither representation being true. It does not matter by whom the misrepresentation is made ; if one has been made, the right to protection is gone. On the authority, therefore, of that case, of *Pidding v. How*,³ and of *Perry v. Truefitt*,⁴ the appellants here have no title to maintain this injunction.

The use by the defendants of the name of the firm of Crocketts is nothing, for here the defendants do not use that name as *531 that of the firm by which the cloth is * manufactured, but merely as a part of the description of the sort of cloth which they distinctly describe as manufactured by their own manager, who had formerly been in the employment of Crockett & Co. There is nothing in that to deceive the public, and, by so doing, improperly injure the plaintiffs. The Vice-Chancellor referred, in judgment, to the case of *Dent v. Turpin*,⁵ as establishing that B. is not to palm off his goods as goods manufactured by A. That has not been done here. Nobody is proved to have been deceived by the mark used by the defendants. No one could look at the two marks or descriptions, and mistake the one for the other.

The two stamps used here on the manufactured article are entirely different from each other. The form of the descriptive writing is not the same in both ; the words used are different ; the two eagles are entirely unlike, and except that the words "leather cloth" and "J. R. and C. P. Crockett" can be found in both, there is no similarity between them.

¹ 11 Hare, 78.³ 8 Sim. 477.² 2 Johns. & H. 139.⁵ 10 Hare, 467.⁴ 6 Beav. 66.

Sir H. Cairns replied.

LORD CRANWORTH. — My Lords, this case coming by appeal from a decision of the Lord Chancellor, I believe it to be more consistent with ordinary usage, and I know it will be more agreeable to his Lordship, that some other member of your Lordships' House, other than the Lord Chancellor, should move the judgment of the House. I have therefore undertaken to do it.

The object of the bill filed by the appellant in this case was to restrain the respondents from selling leather *cloth *532 having the trade mark of the plaintiffs affixed to it, so as to represent the cloth so sold as being cloth manufactured by the plaintiffs. [His Lordship here stated the facts of the case.]

The ground on which his Lordship proceeded was, that the trade mark used by the appellants is so constructed and worded as to contain more than one false assertion calculated to mislead those who rely upon it; that it represents the articles stamped with it as being the goods of the Crockett International Leather Cloth Company; that these goods had been manufactured by J. R. and C. P. Crockett; and that they were tanned leather cloth. The Lord Chancellor was of opinion that to give protection to such a trade mark, when affixed to goods not of the International Leather Cloth Company, not manufactured by J. R. and C. P. Crockett, and not consisting of tanned leather cloth, would be to make the Court of Chancery ancillary to the protection of fraud; and that it would or might enable manufacturers and sellers of goods to secure custom to themselves, by falsely leading purchasers to believe that they were buying something different from that which the trader was in fact selling.

Of the justice of this principle no one can doubt. It is founded in honesty and good sense, and rests on authority as well as on principle. Vice-Chancellor Shadwell refused to protect a trade mark whereby the plaintiffs falsely represented the tea they were selling as being something different from what it in fact was; and there are other cases in the books resting on the same principle.

The case put by the Lord Chancellor, of the sale of a manufactory of fine cloth by A. B. & Co. in Wiltshire, to C. D. & Co., manufacturers in Yorkshire, who should afterwards

*carry on the manufactory there, would be another illus- *533

tration of the same principle. If the purchasers were in such a case to stamp their goods with the trade mark, "A. B. & Co., makers, Wilts," they would be, under the name of a trade mark, really attempting to deceive buyers, and would be entitled to no protection, even though that had been the trade mark used by the vendors of the business.

So in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, of cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well-known hop garden in Kent or Surrey, no protection would be given to the sellers of such goods if they were not really the produce of the places from which they purported to come.

But the counsel for the appellants argued that this principle is inapplicable to a case like the present, where the appellants fairly and openly bought the manufactory, as carried on in this country, with full right to use the old trade mark. Such a course, they contended; was perfectly honest and consistent with the universal practice of trade.

The Lord Chancellor observes that the ground on which Courts of law and Courts of equity have interfered in the case of trade marks has not been well defined, and has not been made to rest on any satisfactory principles.

The right to a trade mark is a right closely resembling, though not exactly the same as, copyright. The word "property," when used with respect to an author's right to the productions of his brain, is used in a sense very different from what is meant by it when applied to a house or a watch. It means no more than that the author has the sole right of printing or otherwise multiplying copies of his work. The right which a manufacturer

* 534 * has in his trade mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured. If the word "property" is aptly used with reference to copyright, I see no reason for doubting that it may with equal propriety be applied to trade marks.

But I further think that the right to a trade mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may

arise where the trade mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be, whether the purchaser in continuing the use of the original trade mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark. In such a case I see nothing to make it improper for the purchaser to use the old trade marks, as the mark * would, in such a * 535 case, indicate only that the goods so marked were made at the manufactory which he had purchased.

The counsel for the appellants argued that this was all which their clients had done in this case, and so that the trade mark used by them was one entitled to protection. The Lord Chancellor thought otherwise, and I am far from saying that I do not agree with him. But I do not think it necessary to go into this question, which appears to me one of some nicety, for I think it clear that there is in this case no infringement.

The defendants' trade mark is certainly not the same as that used by the appellants. But is it only colourably different? I think it is so different as to make it impossible to say that it is substantially the same. No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution. Here the differences are so palpable that no one can be deceived. In the first place, the shape is different. The plaintiffs' trade mark, if trade mark it is to be called, is contained in a circle. The design of the defendants' is a semicircle, mounted on a parallelogram. It is said that the defendants' goods may be so rolled as to expose

only the semicircle, and so lead to the belief that the device in its integrity is a circle. I answer *vigilantibus non dormientibus leges subserviunt*. There might, however, be some force in the observation if the upper half was the same as, or even if it closely resembled the upper part of the plaintiffs' device. But this is not so. The name of the company is different. The word "Crockett" is prominently exhibited twice in the plaintiffs' upper half ;

* 536 not once in * the defendants'. No one taking the trouble to read the two can say that he would be deceived.

The gist of the complaint in all these cases is, that the defendants, by placing the plaintiffs' trade mark on goods not manufactured by the plaintiffs, has induced persons to purchase them, relying on the trade mark as proving them to be of the plaintiffs' manufacture. This necessarily supposes some familiarity with the trade mark ; but, to any one at all acquainted with the plaintiffs' trade mark in this case, I can hardly think that even on the most cursory glance there could be any deception.

Each of the trade marks, it is true, as well that of the plaintiffs as that of the defendants, contains within its periphery an eagle, or that which we must suppose was meant to represent an eagle ; but one does not at all resemble the other. The rest of the device, if it is to be called a device, consists merely of words intended to indicate the nature or quality of the article, the place of its manufacture, and the names of the manufacturers. No one reading the two could fail to see that they differ in all these particulars. The letters are all printed in very large type, and the diameter of the circle which contains them is above six inches, so that there can be no difficulty in deciphering what is stamped.

I mention this because if, instead of occupying the large space, the whole had been engraved on a stamp of the size of a sixpence or a shilling, so as not to be capable of being read without a magnifying glass, or even without close examination, the case might have been different. A person purchasing leather cloth so stamped might, perhaps, fairly say, I did not attempt to decipher what was stamped on the article which I bought ; I saw it had on it

* 537 what appeared to be, and what I could not discover * not to be, the plaintiffs' stamp, and I therefore took it for granted it was the produce of their manufactory. But this cannot apply to a case like that now before us, where that which is called a trade mark is in truth an announcement of the names of the manufacturers, the

style of the firm, and the place of the manufacture, in large letters, not only capable of being easily read, but intended to be read by all to whom the goods are exposed for sale.

The object of the plaintiffs in the use of their device was to announce (I do not say unfairly or dishonestly to announce) to purchasers that they were buying goods manufactured at what was the original International Leather Cloth Company at West Ham, carried on by the Messrs. Crockett. I do not think that a firm using such a device by way of trade mark can say that a rival manufacturer is guilty of an infringement when he has adopted a device differing in shape, and announcing in letters equally large and legible, the name of a different firm manufacturing goods at a different place.

On this short ground, I think that the appeal ought to be dismissed with costs.

LORD KINGSDOWN. — My Lords, there are two questions to be decided in this case; 1st. Whether the plaintiffs, the present appellants, have proved their allegation that their right to the exclusive use of what is called their trade mark has been violated by the defendants. 2d. If that fact be established, whether there are such misrepresentations made by the plaintiffs in their trade mark as to disentitle them to protection in a Court of equity.

The rules of law applicable to both questions are sufficiently clear and simple, though some difference of *opin- *538 ion seems to prevail as to the precise principles on which they rest; and great difficulty is often found in applying (in this as in other matters) known rules to the facts of particular cases.

The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore, in the language of Lord Langdale in the case of *Perry v. Truefitt*,¹ "be allowed to use names, marks, letters or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself, and if such symbol or emblem comes by use to be recognised in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar

¹ 6 Beav. 66.

description. This is what I apprehend is usually meant by a trade mark, just as the broad arrow has been adopted to mark government stores, a mark having no meaning in itself, but adopted by and appropriated to the government.

The plaintiffs' trade mark, or what they call such, is of a different description, and under the second question for consideration the difference may be material, but for the first question it does not seem to me to be so.

In dealing with this point, it may be useful to consider, first, what representations the defendants had a right to make, and next what representations they have actually made.

The leather cloth, of which the manufacture was first invented or introduced into this country by the Crocketts, was not * 539 the subject of any patent. The defendants had * a right to manufacture the same article, and to represent it as the same with the article manufactured by Crocketts. And if the article had acquired in the market the name of Crocketts' leather cloth, not as expressing the maker of the particular specimen, but as describing the nature of the article by whomsoever made, they had a right in that sense to manufacture Crocketts' leather cloth, and to sell it by that name.

On the other hand they had no right, directly or indirectly, to represent that the article which they sold was manufactured by Crocketts, or by any person to whom Crocketts had assigned their business or their rights. They had no right to do this, either by positive statement, or by adopting the trade mark of Crocketts & Co., or of the plaintiffs to whom Crocketts had assigned it, or by using a trade mark so nearly resembling that of the plaintiffs as to be calculated to mislead incautious purchasers.

These being, as I conceive, the rights of the defendants, and the limits of those rights, what is it that they have actually done, and in what respect have they infringed the rights of the plaintiffs?

That depends upon the question how far the defendants' trade mark bears such a resemblance to that of the plaintiffs, as to be calculated to deceive incautious purchasers.

If we compare the statements of the two trade marks, there is no statement in the one which can be considered as identical with or indeed as resembling the other, except this, that both profess to sell leather cloth, a profession which both have a right to make.

The defendants describe their article as "leather cloth man-

ufactured by their manager, late with J. R. & C. P. * 540
Crockett & Co.," clearly showing that they do not pretend
that their cloth is manufactured by that firm, or by any persons
who have succeeded in business to that firm. The plaintiffs on
the other hand describe their article as "Crocketts & Co.'s tanned
leather cloth, patented Jan. 24th, 1856, J. R. & C. P. Crockett,
manufacturers."

Neither in the description of the article to be sold, nor of the
makers, is there any thing to be found which could induce any
person of common sense to suppose that in buying the defendants'
goods he was buying what had been manufactured by the plain-
tiffs.

But it is said that in the form of the stamp, the adoption of the
American eagle as an emblem, and the collocation of the words
J. R. & C. P. Crockett & Co., there is an obvious imitation of the
plaintiffs' mark, likely to lead to a mistake of the defendants'
goods for the goods of the plaintiffs.

On comparing the two stamps, there does not appear to me to
be any such general resemblance as is relied on, nor do I think
that there was in truth any intention to produce such result,
though the intention is immaterial if the result be produced.

I think that the object of the defendants was of another kind;
that their object was not to represent their company as the plain-
tiffs' company, or their goods as the plaintiffs' goods, or to produce
any confusion between the two, but to represent themselves as a
rival company manufacturing and selling the same article with
the plaintiffs, viz. the leather cloth invented or supposed to have
been invented by Crocketts in America, and which they desire to
recommend to customers, by holding out that it is manufac-
tured not by Crocketts, but by persons who, * having been * 541
in the employment of Crocketts, may be supposed to have
acquired complete knowledge of their process.

Now, these representations are no infringement of the plaintiffs'
rights. And the purpose which I have supposed accounts for the
similarity, as far as there can be said to be any similarity, between
the trade marks of the two companies.

The defendants wish to represent that their business consists in
manufacturing and selling not merely leather cloth, but the par-
ticular leather cloth invented in America by Crocketts, and they
therefore take the name of the American Leather Cloth Company.

For the same reason they adopt the American eagle as a badge ; but its figure has not the smallest resemblance to the same emblem on the plaintiffs' representation. For the same reason they refer, in prominent characters, to J. R. & C. P. Crockett & Co., for the purpose of showing that they manufacture the same article which Crockett manufactured, and have the means of using the same processes which Crocketts used, by the employment of a person who has been in the service of those gentlemen.

If this statement be true, the defendants are justified in making it ; but if it be untrue, however reprehensible the statement may be, it does not constitute a colourable imitation of the plaintiffs' trade mark, or amount to an infringement of their rights.

I think, therefore, that the plaintiffs have failed in proving the fact which forms the foundation of their case, and in establishing any ground for the interference of the Court ; and that for this reason, if for no other, the appeal must be dismissed.

But it may be proper to make some observation on the second point, which is one of great importance.

* 542 * Nobody doubts that a trader may be guilty of such misrepresentations with respect to his goods, as to amount to a fraud upon the public, and to disentitle him on that ground, as against a rival trader, to the relief in a Court of equity which he might otherwise claim. What would constitute a misrepresentation of this description, may in particular cases be a reasonable subject of doubt, and it was in the present case the ground of the difference between the two judgments under consideration.

The general rule seems to be that the misstatement of any material fact calculated to deceive the public, will be sufficient for the purpose. This was the foundation of the judgment in *Perry v. Truefitt*, and in the case of *Howqua's mixture*, and several other cases, as well as of the Lord Chancellor's judgment in the case before us.

It was said that if this principle be pressed to its full extent, it will prevent the use of the name of a firm by any but the original partners, and will of course prevent, on a transfer of the business, the right to use the name by any other persons.

But the answer to this is, that by the usage of trade, the name of a firm is understood not to be confined to those who first adopted it, but to extend to and include persons who have afterwards been introduced as partners, or persons to whom the original

partners have transferred their business. The name of the firm continues to be used in many cases long after all the original traders have died, or ceased to have any interest in the concern, as in the great banking houses of Child and of Coutts, and many other mercantile houses.

If a manufacturing house uses the name of a firm, and stamps the name of its firm upon its goods, though the name of the firm no longer represents the same persons *as at first, *543 it is no fraud upon the public, for the reasons I have already alluded to.

For the same reason, the use of the old trade mark of the firm by the new partners, or their successors (if the term "trade mark" be understood in what I have already said is its proper sense), is no fraud upon the public; it is only a statement that the goods are the goods of the firm whose trade mark they bear.

But trade marks, or what are called such, may go much further than this, and contain, as those in the present case do, statements materially affecting the value of the goods to which they are affixed. In such case they must be judged of like statements made in separate labels or advertisements. The question will be, are such statements true? And if not, are they misstatements of material facts, and calculated to impose upon the public.

If a trade mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade mark to relief in a Court of equity against any one who pirated it.

In *Flavel v. Harrison*,¹ Vice-Chancellor Wood intimated his opinion that this would be so when there never had been any patent at all: but in the subsequent case of *Edelsten v. Vick*,² he seems to doubt whether the rule would be the same if there had originally been a patent, and the statement in the trade mark, being true when first introduced, had been continued after it had ceased to be true. I confess that I should have great difficulty in assenting to that distinction. If the word "patent" be not so used as to indicate the existing *protection of a pat- *544 ent, but merely as part of the designation of an article known in the market by that term (and this I collect to have been the main ground of his Honour's decision), then I quite agree in

¹ 10 Hare, 467.

² 11 Hare, 78.

his view. In such case nobody is meant to be deceived, or is deceived ; a patent may have expired, and be known to have expired fifty years ago, and yet the name of " patent " may have become attached to the article, and be used in the trade as designating it ; but if the trade mark represents the article as protected by patent, when in fact it is not so protected, I cannot think that it can make any difference whether the protection never existed or has ceased to exist.

If in this case the true effect of the plaintiffs' trade mark or label is to represent that the article stamped with it is protected by a patent, whether it is understood to mean only tanned leather cloth or leather cloth of any other description, then I think it is a misrepresentation of a material fact, calculated to mislead the public, and sufficient to debar the plaintiffs from relief against piracy in a Court of equity ; and I agree with the Lord Chancellor, in thinking that this is the true meaning of the statement.

With respect to the use of the words " J. R. & C. P. Crockett, manufacturers," the question is involved in more difficulty. Though a man may assign his business and the use of his firm, and of his trade mark as belonging to it, that proceeds, in my opinion, upon the ground which I have stated, that the use of the name of the firm is not understood in trade to signify that certain individuals, and no others, are engaged in the concern. Though a man may have a property in a trade mark, in the sense of having a right to exclude any other trader from the use of it

*545 in selling the same description of goods, it does * not follow that he can in all cases give another person a right to use it, or to use his name. If an artist or an artisan has acquired by his personal skill and ability a reputation which gives to his works in the market a higher value than those of other artists or artisans, he cannot give any other persons the right to affix his name or mark to their goods, because he cannot give to them the right to practise a fraud upon the public.

The reference to the Crocketts, in the words to which I have adverted, is obviously not used as representing the name of the plaintiffs' firm, for that is stated in the circle of the trade mark. Can it be understood as meaning only that the plaintiffs have succeeded to, and are entitled to use, the name of that firm ? I think that it cannot, and that it must be understood to mean that those individuals personally are concerned in the manufacture of

the goods so stamped. This is a circumstance, calculated, if true, to give an increased value to the goods, and being untrue, it seems to me to amount to an imposition upon the public.

On the whole I agree with my noble friend in thinking that the appeal must be dismissed, with costs.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, although I might be well satisfied, and perhaps it might be the better course, to leave the decision of this appeal upon the opinions of my two noble and learned friends, and the judgment which I gave in the Court below, yet I feel it to be my bounden duty to say that, having attended with great care to the arguments of the appellants' counsel, distinguished as they were by great learning and ability, and having also carefully attended to the judgments which have been delivered by my noble and learned friends, the effect upon my mind * has been this, * 546 that I am satisfied that I assigned for my decision in the Court below, a ground narrower than I might have taken as the basis of that judgment. There were circumstances which induced me to think that it was necessary to consider the case from the particular point of view which I adopted: and having found that that ground was sufficient for the judgment which I gave, I did not enter into the consideration of the wider view of the subject which has been so forcibly urged by my noble and learned friends. But, in truth, my Lords, not only do I concur with them, but I am satisfied that I ought to have regarded this affix to the plaintiffs' goods, which is here denominated a trade mark, as something which, according to the anterior usage and application of the words "trade mark," by no means resembles or comes within the description of any thing that has hitherto been properly designated by that name.

My Lords, what is here called by the appellants a trade mark, is, in reality, an advertisement of the character and quality of their goods. And, dropping for a moment all reference to the incorrect and untrue statements contained in that advertisement, I will take only what is called the "trade mark" of the plaintiffs, and the rival or antagonistic trade mark of the defendants, and compare them together, taking them as if they were simply what in reality they are, two advertisements, each affixed by way of label to the articles manufactured by the parties respectively.

Now, comparing them merely as advertisements, and taking them in that character alone, we shall at once find that there are various statements contained in the advertisement of the appellants, which are not to be found in any form, direct or indirect, in the advertisement of the respondents.

My Lords, this advertisement is the sole foundation of * 547 * the plaintiffs' case, and their allegations must be reduced in substance to this ; that having advertised and described their goods in a particular manner, the defendants have borrowed their advertisements, and described their goods in substantially the same manner : let us see then whether that is at all correct. In the first place, the plaintiffs in their advertisements describe their manufacture as "Crockett & Co.'s leather cloth" ; the sole denomination applied by the advertisement of the defendants is, "leather cloth" (which was perfectly well known, independently of "Crockett & Co.'s" cloth). Further, the plaintiffs state, not only that they sell and make Crockett & Co.'s leather cloth, but that it is "tanned leather cloth" ; an allegation to which there is nothing whatever similar or corresponding in the advertisement of the defendants. Further, the appellants represent that their article is the manufacture of J. R. & C. P. Crockett, for they are described as the manufacturers. Not only is there nothing correspondent to that in the advertisement of the defendants, but what the defendants assert is simply, not that it is manufactured by Crockett & Co., but that it is manufactured by their manager, who was formerly in the employ of J. R. & C. P. Crockett & Co. If, therefore, these are regarded as being, what in reality they are, representations of two different articles, it is impossible to say that the representation which is contained in the advertisement of the one contains either identically or substantially, the representations which are contained in the advertisement of the other. And if you drop the statements in words, and take only the symbols employed in the one case and in the other, it will be found that they differ entirely in their character and effect in the two * 548 cases ; in the one * case it will be seen that you have the eagle with his wings fully extended ; in the other case you have that which is called, I believe, in America, the "screaming eagle," armed with his talons, and perfectly different in character and shape from the other. There is also another, which seems to

be intended to be a representation of a sparrow hawk, which again is very different from the others.

I have added these few observations for the purpose of showing, not only that the ground which I took in the Court below was a ground sufficient for my decision, but also that the grounds which have been now superadded by my noble and learned friends, and which I regret that I did not more fully consider and adopt as the basis of my former judgment, would warrant the same conclusion; and would, perhaps, have tended still more in favour of the defendants.

I concur entirely in the motion that has been made, that this appeal be dismissed with costs.

Decree and order appealed from, affirmed; and appeal dismissed with costs.

Lords' Journals, 12th May, 1865.

1865. May 26, 29.

R. O. ALDWORTH, *Appellant*.
WILLIAM ALLEN, *Respondent*.

*Irish Tenantry Act. 19 & 20 Geo. 3, c. 30. Renewable Leases.
Delay. Septennial Fines.*

Septennial fines only become payable under the 19 & 20 Geo. 3, c. 30 (The Irish Tenantry Act) where the nonpayment of a fine on the dropping of a life in a renewable lease is the fault of the tenant. The right to such septennial fines is given by the Act as a consequence of the tenant's neglect.

Where such renewal fine, and the rent, &c. have been properly calculated, and the calculation transmitted to the landlord or his agent, and admitted to be correct, and an offer to pay the amount has been made, accompanied by a demand for a renewal, and the grant of the renewal has been postponed for the landlord's convenience, he cannot afterwards by imposing conditions and requiring proof of the tenant's title, open up the whole matter, and make the delay, which thenceforward occurs, the ground for demanding septennial fines, and rely on the refusal to pay them as a cause of forfeiture.

A. granted a lease for three lives renewable for ever. In 1844 two of the lives having dropped, the tenant sent in a demand for renewal, together with the calculation of rent, fines on the dropped lives, &c., and an offer to pay what was due. The account was acknowledged to be correct, but the renewal was put off on account of the landlord's absence from Ireland. In 1845 and 1846 a correspondence occurred between the agents, and on the part of the landlord the tenant was required, by a given day, to prove strictly his title to renewal, and also to pay all the renewal and septennial fines, calculated up to that time. These last were demanded, under the statute, as a consequence of the nonpayment of the ordinary renewal fines when originally demanded. These conditions were not complied with, and some years afterwards a bill was filed to compel a renewal:—

Held, that the tenant was entitled to a decree for renewal without paying the statutory septennial fines.

THIS was an appeal against a decree of the Court of Chancery in Ireland, directing the respondent to renew to the appellant a lease of certain lands in the county of Cork.

* 550 * In 1722 Richard Aldworth demised to James Hudson, his heirs and assigns, one hundred and forty acres of the lands of Liscongill, in the barony of Duhallon, in the county of Cork, for three lives, at the yearly rent of 36*l.*, and of sixpence in the pound as receiver's fees. The lease contained a covenant for perpetual renewal on payment of 9*l.* as a renewal fine on the fall of each life. In 1818 this lease was renewed, and the lives then inserted were those of William Tivey, John Bass, and James Hudson Mallet. On the 24th February, 1841, William Allen, the grandfather of the respondent, who it was alleged had up to that time been occupying tenant of these lands, obtained from the descendant of the original lessee, a conveyance of the lease to himself, his heirs and assigns. At that time William Tivey and John Bass were both dead; Tivey having died in 1822, and Bass in 1837. The renewal fines on their lives were therefore due. On the marriage of William Allen's son in 1842, a settlement was executed, whereby William Allen was made equitable tenant for life of the lands held under the lease, with remainder to the son for life, with remainder in tail to the eldest son of the marriage.

In 1844 Richard Oliver Aldworth (the appellant) was entitled to the rent reserved on the lease, and was the person having power to grant the renewal. In that year the renewal was applied for by Mr. Bastable, acting as the attorney for Mr. Allen. The application was made to Mr. N. Johnson, the attorney for Mr. Aldworth,

who was himself at that time absent in Germany. No answer having been given to this application, Mr. Bastable wrote the following letter, dated April 10, 1844, to Mr. Johnson: "I have been expecting to get the draft renewal settled; Mr. Smith" (who was Mr. Aldworth's land agent) "told me he wrote to you to settle * the draft renewal; the moment you send it to * 551 me, it shall be engrossed and tendered for execution. The renewal fines are ready to be paid."

On the 20th April Mr. Johnson answered thus: "I am requested by Mr. Aldworth to say to you, that on his return to this country from Germany next year, he will execute the renewal of the lease of Liscongill, provided that you, on or before the 1st of June next, satisfy me, as his agent, that you are legally entitled to the same, by the production of such certified or compared documents as may be necessary, or the originals thereof; and he has further directed me to say that he will not hold you accountable for the payment of any further septennial or other fines than those now due up to and for the present period, the amount of which appears to be ascertained by an account this day given to me of the same."

It was stated in evidence, and did not appear to be contradicted that, with the draft renewal, Bastable had sent to Johnson copies of the deeds, the date of each of the two deaths, and the calculation of the fines then payable, and the accuracy of the calculation was not disputed. Before August, 1844, Johnson sent these copies to Smith, to enable him to compare them with the originals. The originals in Bastable's possession were intrusted by him to O'Connell, his clerk, to enable Smith to compare them with the copies, but Smith would not make the comparison with the clerk.

Nothing more appeared to have been done till the 26th January, 1845, when Mr. Bastable wrote to Mr. Smith the following note: "I am informed Mr. Aldworth is now in the country; Mr. Allen is anxious to have the renewal of Liscongill perfected without any further delay; he is ready to pay all the renewal fines and interest. I hope * you will appoint an early day to have * 552 the renewals perfected." On the same day he sent a letter to Johnson in these terms: "Mr. Aldworth is now in the country, and I am informed only intends remaining a short time; be so good as to send me the draft renewal of the lease of Liscongill approved of, that I may have it engrossed and tendered for execu-

tion. Mr. Allen is applying to me every day to get the renewal perfected. I am anxious to get Mr. Allen off my hands."

No answer being sent to either of these letters, Mr. Bastable, on the 1st August, 1845, went to Mr. Aldworth's house, and tendered to him the amount of the renewal fines, &c. as calculated in April, 1844, and then admitted by Johnson to be correct. Aldworth refused to accept them, and referred Bastable to Johnson. On the 13th September, 1845, Bastable applied, in like manner, to Johnson, but Johnson (who had in the mean time been appointed clerk of the peace for the county, and had thereon given up practice as an attorney) said he could not act in the business, and referred Bastable to Smith. On the 15th September, Bastable forwarded to Smith a formal statement of what he had done, and, as agent for Mr. Allen, called on Smith as agent for Aldworth, to do what was necessary for the completion of the renewal. On the 22d September, Smith acknowledged the receipt of this notice, promising to acquaint Aldworth with it. On the 30th October, 1845, Smith again wrote to Bastable, referring him, by Aldworth's orders to Mr Disney, of Dublin, as Aldworth's law agent. On the 26th November, by appointment, Bastable attended at Disney's office, and the deeds and copies were produced and compared. On the 8th December, 1845, Disney being satisfied as to Allen's title, addressed a letter to Bastable requiring that new lives should be nominated, and septennial fines and interest

* 553 * should be paid up to that day. On the 24th January, 1846, Bastable (having previously furnished two new names) wrote a letter to Disney, in which he said, "In the absence of Mr. Aldworth, Mr. Allen is ready to pay any renewal fines, &c. that are fairly due, and if obliged to pay more than was agreed on by Mr. Aldworth and Mr. Johnson to be received, he is sure Mr. Aldworth, on his return, will refund to him any overplus he may now pay." On the 26th January, 1846, Mr. Disney wrote to Mr. Bastable the following letter: "I must require strict legal evidence of the date of the death of the *cestui que vies*, in whose place you seek renewals, and also that all rent, renewal and septennial fines, and interest, be forthwith calculated and paid to Mr. Aldworth's agent." On 26th February, 1846, Bastable wrote to Disney a notice, in which (after reciting Disney's demands) he said he had already sent the proper declarations as to the deaths of Tivey and Bass; that with regard to the renewal and septennial fines, they

had all been calculated and particulars presented to Mr. Aldworth's former law agent, and agreed to by him in his letter of 20th April, 1844, of which Disney had a copy. Bastable declared that on Aldworth's return to Ireland in 1845, he had been tendered the renewal and septennial fines, and interest, agreed to by his former law agent, as could be proved; and he therefore called on Disney to return him the draft renewal, then in Disney's hands, approved, that it might be completed; and if he omitted to do so within a reasonable time, he was to take notice that proceedings would be taken to compel the renewal.

This closed the correspondence between the parties. Mr. W. Allen died in 1854, and his son died in January, 1861. On the 15th February, 1861, one of the trustees of the respondent (he being a minor), served a notice on * the appellant, de- * 554 manding a renewal, and tendered the fines then due. The demand was refused, because, as it was alleged, the right to renewal had been forfeited on the ground of delay, after demand made, in the payment of the renewal and septennial fines and interest. The demand relied on was that made by Disney in 1846. On the 30th May, 1861, a cause petition was filed in the Court of Chancery on behalf of Wm. Allen (the now respondent) claiming a renewal of the lease of 1722. Affidavits were filed in support of and in answer to this petition; and on the 6th February, 1862, the Lord Chancellor made an order declaring the petitioner entitled to a renewal of the lease on payment by him of rent renewal and septennial fines and interest thereon, as calculated and returned to Johnson in April, 1844, and interest thereon from April, 1844, till paid; also, the several fines, septennial fines and interest that became due since April, 1844; and it was ordered that the heirs nominated in 1846 should be inserted, and the fines in respect of the death of one of them since that time should be paid; the master to settle the amount in case of difference between the parties; and the petitioner was to pay to Aldworth his costs, incurred up to and including the hearing, &c., with liberty to apply.¹

This was the order appealed against.

Sir H. Cairns and *Mr. Warren* (of the Irish bar) for the appellant. — There is no doubt that in the Irish Tenantry Act, 19 & 20 Geo. 3, c. 30, there is something permitted to the tenant which

¹ 13 Irish Ch. N. S. 190.

much resembles an equitable right of redemption. But * 555 that may be forfeited by the acts of * the party who could otherwise claim the benefit of it. It has been forfeited here. Fines are due, a formal demand of them has been made, and payment of them, though not in terms refused, has been unreasonably delayed. It may be admitted that a tender had at one time been made; but at that time it was doubtful whether the respondent had any title to ask for a renewal; and, on the question of title, the landlord had a clear right to be satisfied before he was bound to grant a renewal. Under such circumstances the tender was of no importance. As to the title, the evidence showed that the claimant had not given satisfactory proof so late as the last letter of Disney, which was in January, 1846. The Lord Chancellor himself had admitted that the conditions of the demand for proof of title were not complied with; but he went on to say that there was no right to impose those conditions especially as to satisfying the proof of title before a particular day. Yet it is clear that, when asked to grant a renewal, the landlord had a right to be satisfied that the person making the demand had a title to make it; and, if so, then the naming of a particular and distant day was perfectly permissible; and was, in truth, an act in case of the tenant.

The authorities on this question are all collected in Lyne.¹ The subject was discussed in *Jackson v. Saunders* and *Mountrorris v. White*,² by Lord Eldon and Lord Redesdale. There, as here, repeated demands for payment of the fines had been made and neglected, and the claim for renewal was refused; and it was said that the last demand, not being complied with, referred back to the original demand, and constituted the neglect and delay against which the Act meant to provide. In a later * 556 * case, *Butler v. Portarlington*,³ in the Court of Chancery in Ireland, Lord Chancellor Sugden stated his opinion that the tenant was bound to pay under the Tenantry Act, and that the demand need not be of a minatory character. In *Galbraith v. Cooper*,⁴ it was held that the mortgagor in possession (the landlord not being informed of the fact of the mortgage), though he had parted with all legal interest in the lease, was a person on whom the demand for the fines could be effectually made. And *Cullen*

¹ "Leases for life renewable for ever." App.

² 1 Drury & War. 20.

³ 2 Dow, 437, 459.

⁴ 8 H. L. Cas. 315.

v. *Leonard*¹ declares that the first duty of the tenant is to pay the fines; and that the moment a demand is properly made, the time for complying with it begins to run; and, if not complied with in a reasonable time, a forfeiture of the right accrues.

The Tenantry Act introduced no new law; it was a mere declaratory Act, but it defined, as far as practicable, what should be laches so as to prevent equitable relief. The tenant here has been guilty of laches, and he is not excused by any act of the landlord or his agents. The letter of the 20th April, 1844, imposed only those terms and conditions which the landlord had a right to impose, and the neglect to comply with which was a neglect that the Act intended to prevent. That neglect occasioned a forfeiture of his right to demand a renewal; and, at all events, it gave the landlord the right to demand septennial fines. It is not enough for the tenant to say that he disputed the title to demand those fines. In *Hunt v. Sayers*,² a bill for renewal was dismissed on account of the tenant refusing to pay more than the renewal fines. That was what the tenant here did in 1846; or, if he asserts that his letter then written was a tender to pay * what was due, he * 557 is bound to show that he offered to pay all that he was bound to pay. In fact, he only offered to pay what was due in 1844, though, in the mean time, the septennial fines had become due. A tender of part of an entire sum is not sufficient, *Dixon v. Clark*.³

The only point on which the respondent could escape from the effect of the delay was, that he had made a good tender in 1845. The sufficiency of that was at an end. As to reasonable time, he had far exceeded that. The law on that point had long ago been settled by the case of *Jackson v. Saunders*.⁴ Here the delay in payment of the fines within a reasonable time after demand made amounted to equitable fraud, *Jessop v. King*,⁵ and is quite sufficient to bar the tenant from all relief through the medium of a Court of equity.

Mr. Rolt and *Mr. Downes Griffith*, for the respondent. — There never was any real doubt as to the respondent's title; nor had there ever been any difficulty on the part of the respondent to comply with any legal demand of the landlord. All the difficul-

¹ 5 Irish Eq. 134.

² Lyne, "On Leases, &c." App. lxviii.

³ 5 C. B. 365; 5 Dowl. & L. 155.

⁴ 1 Sch. & L. 443.

⁵ 2 Ball & B. 81, 92.

ties here arose from the act of the landlord or his agents. The Court will look into the circumstances of each case to know what the cause of the delay really is; *Trant v. Dwyer*,¹ where, as here, there was another matter, which was the real cause of difference between the parties, independently of payment of fines, or of title. This House held that the nonpayment of the fines having arisen from disputes on some collateral matter, such nonpayment did not deprive the tenant of his right to renewal. *Jackson v.*

* 558 *Saunders* * is really an authority for the respondent, for it not only shows that the Court may exercise a discretion, but points out what circumstances are sufficient to guide the Court in the exercise of it. Here the fines were calculated in 1844, and would have been paid at that time but for the act of the landlord and his agents. The delay in the payment of the fines not having arisen from the tenant, but from the conduct of the landlord, no added septennial fines could be demanded in respect of the delay in payment. It was the more especially so here, since in one of the letters the landlord expressly says that he shall not ask for any septennial fines on account of delay. The offer to pay had at that time been made, and the delay was his own, and for his own convenience. In *Jackson v. Saunders*,² the Lord Chancellor declared it to be the right and duty of the Court to take such circumstances into consideration in coming to a decision on a claim like the present. And *Trant v. Dwyer* shows that where an express demand is made, and there is a readiness to comply with it a further demand cannot be implied. What was said there is true here, namely, that if the money admitted to be due had been offered it would not have been accepted. The omission to offer it when more was demanded than was due, does not constitute a neglect under the Act so as to deprive the tenant of his right to relief. *Jessop v. King*³ is really in accordance with the claim here made by the tenant, for it shows that renewal is a matter of right where there has been no delay, or no delay amounting to an equitable fraud. There has been none here.

May 29.

* 559 * THE LORD CHANCELLOR (LORD WESTBURY). — The Act of Parliament which is commonly known by the name of the Irish Tenantry Act, was a measure of very liberal tendency,

¹ 1 Dow & C. 125; 2 Bligh, N. S. 11.

² 2 Ball & B. 81.

³ 1 Sch. & L. 443, 459; 2 Dow, 437.

passed by Parliament with special reference to the circumstances of the tenure of land in Ireland. In that country a great part of the land at that time was, and still is, held upon long leases, generally for a period of three lives, and sometimes renewable for ever. Accordingly that Act introduced this principle, that the right of renewal granted by those leases to the tenants, and frequently under particular terms with respect to time, should never be deemed to be lost or forfeited by the simple neglect of the tenant. But that liberal indulgence was subject to two qualifications: one, that the conduct of the tenant should never amount to that which might be deemed fraud (I suppose in the estimation of a Court of equity); and the other, that if the landlord at any time discovered a default of renewal and demanded a fine, and the tenant did not pay the fine within a reasonable time, the right of renewal should be lost and put an end to.

This state of things necessarily led to another rule, which has been also firmly established, and it is this, that where, as in many cases, the neglect of the tenant to renew might extend over a long period of time, the landlord's right to fines should not be lost during that period, but that the landlord should become entitled, at the expiration of every seven years, to that fine which he would have received if the renewal had been granted and the life had dropped at the expiration of each such septennial period. The septennial fine therefore arises as a consequence of the neglect of the tenant, and if there be no neglect, the right to the septennial fine cannot arise.

With these few observations, I shall beg leave to direct
 * your Lordships' attention to the few dates which alone are * 560
 material for the determination of the present case. In the case in question, two lives had dropped anterior to the year 1844, and the latter of those two lives ended in the month of November, 1837; seven years therefore, computed from the date of the termination of that life, would bring us to the month of November, 1844.

In the month of April, 1844, the present tenant, or rather the tenant for life under the settlement that had been made of the lease, applied to the landlord to renew. The fines that were then payable were computed, and, as it now turns out, accurately computed; and the tenant, through the medium of his agent, applied to the landlord's agent and solicitor by a letter dated 10th April, 1844, which I will now read. [His Lordship read it.]

It is impossible after that letter to impute to the tenant any neglect in the application to renew his lease; the tenant had ascertained what he was liable to pay, and having taken the necessary steps to obtain a renewed lease, tells the landlord most distinctly that the fines are ready to be paid.

For some reason or other, the landlord was disinclined to receive and to meet the tenant's application with equal promptitude. The landlord, availing himself of the fact that during a considerable part of the year his residence was generally abroad, wrote by his solicitor, Mr. Johnson (to whom the former letter was addressed), to the tenant. This letter distinctly says that Mr. Aldworth either was on the Continent, or on his way to the Continent, and that he, Johnson, was requested by Mr. Aldworth, the landlord, to say, "that on his return to this country from Germany next year, he will execute the renewal of the lease of Liscongill." I pause there for a moment in citing the language of the letter.

* 561 * It is perfectly clear, as I apprehend your Lordships will be of opinion, that any imputation of neglect or laches on the part of the tenant having been excluded by the application and the two letters which had passed, it was impossible that any septennial fine could afterwards accrue to the landlord during the time when the landlord excused himself from complying with the application of the tenant. I apprehend that, under the circumstances, your Lordships will approve of this principle, and of its application to this state of facts, namely, that all those things which the tenant could at that time have been required to do, and which we now find he had the means of doing, ought to be considered as things which he would have done if the landlord had answered his application on the 10th of April in a similar spirit to that in which the application was made, and had said, "I am willing to receive your application to renew, and to receive the fines that are payable to me, provided you show that you are the person who is entitled to that renewal." It is quite clear that the present respondent had the means of proving conclusively to the landlord that he was the person entitled to make this application of renewal; and it is shown beyond all doubt, that the fines which had been calculated, and the amounts of which were stated by the tenant in his application, were the fines which at that period of time, namely the 10th of April, were all that the landlord was entitled to demand. And the tenant, therefore, upon the ordinary principles of law, had a

clear right to say, "Every Court of equity is bound to take it for granted that what I desired to do, and what I had the means of doing, I should certainly have done, if the landlord had been willing to receive my application, and had not postponed the consideration of that application until a future day."

* Then, my Lords, the landlord in his letter goes on to *562 tell the tenant that he requires him in the interval to satisfy his agent as to his legal title. And he is not content with doing that, but he prescribes a particular day, namely the 1st of June of the following year, before which the obligation to satisfy his solicitor as to the tenant's legal title must be performed. He then goes on to say that the landlord will not hold the tenant accountable for the payment of any septennial or other fines than those now due.

Now, the argument on the part of the appellant is this. The landlord has given a conditional engagement not to demand any further septennial fines; but that engagement is subject to the proviso that the tenant shall prove his title before the first of June, a condition which the tenant did not perform; and therefore it is said that the landlord became entitled to further septennial fines.

The whole argument is, I apprehend, founded on this fallacy, that the landlord could have become entitled to a septennial fine as a matter of course, if the tenant had not proved his title. It is a fallacy, because the moment that the landlord declined for his own convenience to entertain the tenant's application and urgent request to renew, all imputation of neglect upon the tenant ceased, and consequently all right to the septennial fines ceased on the part of the landlord. And in reality that determines the whole matter, for the first two lines of the landlord's letter postponing, for his own convenience, a compliance with the tenant's request, involved the necessary consequence that the landlord's title to any further septennial fine ended; and the landlord had no right to make his promise of a release from a further septennial fine, to which he had no title, a reason and ground for imposing

* upon the tenant an obligation of proving his title to a re- *563 newal before the expiration of a particular day.

Let it be granted that there was an obligation upon the tenant to prove his title to claim the renewal, anterior to the time when the landlord was to grant the renewal; that brings us to the subsequent part of the case, for the purpose of ascertaining whether there was any refusal, or any wilful default, or gross negligence;

on the part of the tenant in not making out that title. An examination into the subsequent circumstances shows clearly this, that the tenant made several ineffectual efforts in order that he might obtain the means of producing to the landlord's agent the original deeds and documents upon which his title depended. The effect of those deeds and documents has been already stated, and that statement in reality had been accepted by the landlord. But of course the landlord had a right to have those statements verified by the production of the originals; and if there had been gross neglect or wilful default on the part of the tenant in producing those original documents, some observation might have been made; but in reality there was none.

We find that on the landlord's return to this country in the subsequent year, namely, in the spring of 1845, the landlord demanded the payment of the fines which he said were then due. The landlord therefore treated the tenant as being under a continued imputation of neglect up to that period of time. That was the only ground upon which he claimed a septennial fine as having accrued in the month of November, 1844; he demanded the fine accordingly. After some correspondence, the tenant falls back upon the computation of the fine that had been made in the month of April, 1844. The question, therefore, is limited to the sole point

* 564 of consideration, * whether the application of the tenant for renewal, which was postponed for his own convenience by the landlord, is or is not a circumstance which disentitles the landlord to say, "Although I have refused to comply with your request for renewal, having no reason for that refusal save my own convenience, yet I will take advantage of the delay produced by that refusal, to impose upon you the obligation of paying the further fine which I know will arise during the period of delay occasioned by my residence abroad." It is perfectly plain that it would be contrary to all fair dealing, to all reason and justice, to allow the landlord to take that unfair advantage of his own act. If he refuses to entertain the application made to him on the 10th of April, 1844, because it was convenient to him so to do, he shall be compelled to receive that application when it is renewed to him in the month of April in the following year, precisely in the same way in which he would have had to receive it, and to deal with it, if he had entertained it, as he ought to have done, in the month of April, 1844.

My Lords, it is upon that principle that I think that the decree of the Court below is perfectly right and just, and that we ought to regard the parties as standing in the same position to one another, relatively, in which they stood on the 10th of April, 1844; and I think that as the tenant at that time clearly had the means of proving his title, and was beyond doubt the person entitled to the renewal, and as he had accurately calculated the amount of the fines due from him, and was no doubt prepared to pay those fines, your Lordships ought to consider the parties in the month of April, 1845, as if they stood in the same position in which they were in the month of April, 1844, and to make your decree have reference to that state of circumstances.

* For these reasons I shall move your Lordships to affirm * 565 the judgment of the Court below, and to dismiss this appeal, with costs.

LORD CRANWORTH. — My Lords, in the course of the argument at your Lordships' bar, it was contended by the counsel for the appellant, that inasmuch as the letter of the 20th of April, 1844, imposed certain terms and conditions, and as those conditions were not complied with, the case must be dealt with just as if no such letter had been written. My Lords, I am quite prepared to accept that view of this case, and I will consider what ought to have been the judgment of the Court below, supposing there had been no answer at all to that letter. In my opinion, the tenant by the letter of the 10th of April, 1844, put himself into this position that, supposing Mr. Johnson had put that letter into the fire, and had returned him no answer, he was in a condition to say, that upon the payment of the fines as they had been calculated, he was entitled to a renewal. The tenant, previously to writing that letter, furnished a proper draft of the lease; and he was in a condition to show that he was entitled to the renewal. He had had the fines calculated accurately, and he sends to the agent of the landlord a letter saying, I call upon you to grant me a renewal. In my opinion, he was then in a condition to enforce that claim; and no delay afterwards on the part of the landlord could in any way prejudice his claim. Upon these grounds, thus very shortly stated, I entirely concur in the motion of my noble and learned friend on the Woolsack.

* 566 * LORD CHELMSFORD. — My Lords, I am of the same opinion with my two noble and learned friends.

In considering the Irish Tenantry Act, there are two things to be carefully distinguished. First, the right of the tenant to relief in equity; and, secondly, the loss of that right by his refusal or neglect to comply with the landlord's demand of the fines.

As to the first, if there is nothing but mere lapse of time to be urged against the tenant, he is absolutely entitled to his equitable relief; the words of the Act being, "That Courts of equity, upon an adequate compensation being made, shall relieve such tenants or their assigns against such lapse of time, if no circumstance of fraud be proved against such tenants or their assigns." And, as Lord Redesdale said in *Lennox v. Napper*,¹ "The principles stated by Lord Thurlow are clear and plain, that 'equity will relieve where there is mere lapse of time unaccounted for, without misconduct in the lessee, or where the lessee has lost his right by fraud in the lessor.'"

With respect to the loss of the right by the neglect or refusal of the tenant to pay the fines after demand, it seemed to be assumed during part of the argument, that a mere intimation from the landlord to the tenant that fines were due, and that they must be paid or the right to renew would be lost, would be sufficient to produce a forfeiture of the right of renewal if the fines were not afterwards paid; this, I think, is not correct. In order to deprive the tenant of his equity, it appears to me that there should be a formal demand made of the fines, though it is not necessary

* 567 to specify the amount which * is due; and this was the opinion of Lord Redesdale, for in the case of *Jackson v. Saunders*, upon a bill for renewal under the Act, he said, "On the 1st March, 1799, the lease of the other moiety of these lands was renewed by Mr. Saunders, and Mr. Jackson was then in truth called on to renew for the moiety in question, though no formal demand was made on him, nothing that would operate to exclude him from renewal under this Act." And after observing that an actual though not a formal demand had been made upon Mr. Jackson near eighteen months before, he added, "Then in October, 1800, a demand is made, which I take to be a sufficient demand under the statute, it being a demand intended to exclude Jackson

¹ 2 Sch. & L. 689.

from renewal in case of non-compliance, and the Act not having prescribed any particular form for such demand."

Looking, then, first to the acts of the tenant, was there any thing to deprive him of his equitable right to a renewal, prior to the time when he might have been in default, in consequence of a formal demand of payment of the fines having been made upon him? A great deal of time was occupied in the discussion of the sufficiency of the tender made by the respondent on the 1st of August, 1845, and it was contended on the part of the appellant that the tender was at all events bad, because the interest upon the fines accruing between the 10th April, 1844, and the time of the tender, was not included in the amount tendered.

The real question, however, on this part of the case is, what was the sum which was due for fines and interest at this time; not in order to determine the validity of the tender (because if no tender at all had been made the equity of the tenant would have been the same), but with reference to the formal demand of the fines which was * afterwards made. It appears to me that * 568 the amount actually due at this time, upon payment of which the tenant would have been entitled to his renewal, was the sum of 47*l.* 14*s.* 8½*d.*, which he was ready and willing and offered to pay. On the 10th April, 1844, Mr. Bastable, the solicitor of the respondent, wrote to Mr. Noble Johnson, the solicitor for the appellant, informing him that he was expecting to get the draft renewal settled, and that the renewal fines were ready to be paid. This was followed by the letter of Mr. Noble Johnson, of the 20th of April, 1844, upon which so much observation has been made on both sides. Mr. Johnson writes [his Lordship read the letter, see *ante*, 551.]

The condition with respect to Mr. Allen's proving his title to the renewal of the lease on or before the 1st June, was one which the appellant had no right to impose. If he wanted to prevent delay, he ought to have made a formal demand of the fines, and then the tenant must have completed the business within a reasonable time. With respect to the passage of this letter as to the period to which Mr. Allen was to be accountable for the fines, I do not consider it as a promise, either conditional or otherwise. It amounts, in my opinion, merely to an assurance that the delay occasioned by the appellant's absence abroad should not turn to the prejudice of Mr. Allen so as to render him accountable for any further fines than those which were then due. If there had afterwards been any

improper delay on the part of the tenant, he might, notwithstanding this letter, have been rendered liable to pay additional septennial fines and interest; but from the subsequent correspondence it appears to have been no fault of his that the matter was not concluded upon the original footing.

So far as I can perceive, therefore, the tenant had done
 * 569 * nothing to disentitle him to a renewal upon the terms of paying the fines due on the 20th April, 1844, down to the 18th November, 1845, when the notice, which I think must be considered to be a formal demand under the Act, was served upon the tenant and his attorney by the attorney for the appellant. This notice intimated the willingness of the appellant to renew the lease, on the tenant showing his title thereto, and nominating lives in place of those who had died, and proving the dates of the respective deaths of such *cestui que vies* as had died (all of which the landlord had a right to require), and also upon his paying up the fines, "septennial fines and interest due at the time of compliance with the above terms," which was an extension of the demand beyond the fines and interest payable on the 20th of April, 1844. It having been previously understood that the claim of the appellant was limited to the fines due on the 20th April, 1844, and the tenant being always ready and willing to take the renewal on these terms, the only difference between the parties being whether the tenant was liable to further septennial fines and interest, the resistance to this increased demand, and the omission to tender what was admitted by the tenant to be due for fines (it being clear, as was said in *Trant v. Dwyer*, that the money would not have been accepted if offered) cannot be regarded as proof sufficient of a neglect or refusal to pay the fines within the intention of the Act.

The tenant might have filed his cause petition immediately after the appellant refused to renew except upon the terms of his paying the additional septennial fines and the further interest; and a notice of the intention to institute proceedings to compel a renewal was given by the tenant's solicitor on the 26th February, 1846.

The delay in commencing proceedings, though very great,
 * 570 cannot * have the effect of depriving the tenant of his right to a renewal, and the decree appealed from is therefore correct, and ought to be affirmed.

Decretal order affirmed, and appeal dismissed, with costs.

Lords' Journals, 29th May, 1865.

McDONNELL v. WHITE.

1865. May 19, 22, 23, 30.

JOHN McDONNELL, *Appellant*.HENRY WHITE (now Lord ANNALY), *Respondent*.*Trust. Limitation of Time. Accounts. Arrears. Delay.*

Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is, that stale demands are not to be encouraged.

In taking accounts against a trustee, when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognizant of all the matters connected with it.

A., being greatly in debt, executed a deed of trust for the benefit of creditors, and, among the property assigned under the trust deed was a lease for lives renewable for ever, on which the rent reserved was really a high rack-rent; the tenant complained, and the trustee, with the knowledge of A., though without his consent, but with the full assent of A.'s brother, to whom A. had committed the management of his affairs, received from the tenant an abated rent; A. complained of the abatement, but he took no steps to put an end to it:—

Held, that the estate of the trustee could not, after the expiration of the trust, be called on to make up the deficiency.

While the trust was in existence, A., who had been absent from the country, returned, was informed of all that had occurred, and made an affidavit in a suit then pending, which had been instituted by one of his creditors. In this suit a receiver was appointed over one of the estates included in the trust:—

Held, that from the date of this appointment the power of the trustee was at an end, and that, as by the law of Ireland, the receiver's duty related as well to the arrears then due from the tenants of that estate, as to those which would afterwards become due, and consequently, no steps having been taken to enforce payment from the trustee of arrears which, before the appointment of the receiver, he had suffered to accrue, his estate could not, after the lapse of many years, be made liable for those arrears.

SIR JOSEPH WALLIS HOARE, Bart., was in 1816 seised for life of an estate in the county of Cork; and was entitled in remainder, under a settlement (after the death of his mother), to lands called the Wallis estate, which comprised a farm called Wise's farm. He was also entitled to the "unsettled Hoare estates," which com-

prised certain lands, called Dromerk, Naskin, Couranig, &c., all in the same county ; these were subject to the payment of certain debts and legacies charged on them by Sir Edward, his father. He was himself indebted to various persons, and it was arranged that he should assign all his estates to Peter Maziere, on trust for the benefit of creditors.

An indenture was accordingly executed on the 14th September, 1816, to which Sir Joseph Wallis Hoare and Mr. Maziere were parties ; but which was also ratified by some of Sir J. W. Hoare's creditors, by their indorsement. This deed recited that the unsettled Hoare estates were subject to encumbrances of Sir Edward, mentioned in the first schedule to the deed, and that Sir J. W. Hoare was himself indebted to the persons mentioned in schedules 2 and 3 ; some of which debts bore interest ; that Sir J. W. Hoare had effected a policy on his own life for the sum of 4000*l.* in the name of Maziere, and had agreed to assign the estates, this policy, and two annuities (of 200*l.* and 100*l.* respectively), to Maziere, on

trust, first, to pay the costs attending the execution of the
 * 572 trust, and five per cent. to Maziere, or * any attorney to be appointed by him, on all moneys received ; in the next, to allow Sir J. W. Hoare 700*l.* a year for maintenance ; then to pay the interest on the debts, &c. in schedule 2, and the annual premium on the policy ; then the principal of the debts in schedule 2, and then to pay off the debts in schedule 3. The deed then duly effected the assignment to Maziere, for the period of twenty-one years upon the above trusts, and after satisfying them, the ultimate trust was for the benefit of Sir J. W. Hoare.

There were three schedules annexed to the deed. The first contained an account of the debts of Sir J. W. Hoare's father, affecting the unsettled estates, which, by his father's will, were subjected to a trust for sale ; the second, the bond and judgment debts, and annuities of Sir J. W. Hoare himself ; and the third, of the bond and simple contract debts, due from him to creditors in England. The policy for 4000*l.* was to expire in 1823. Soon after the execution of the deed, Sir J. W. Hoare came to reside in England ; his mother died not long afterwards, and the trustees entered on the beneficial possession of the Wallis estate.

In 1819 Sir J. W. Hoare being harassed by his creditors, determined on leaving England, and residing permanently in France. On quitting England he executed a power of attorney to his

brother, the Rev. Thomas Hoare, then residing near Cork, authorising him, at the request and with the approbation of Maziere, to demise the land to which he was entitled for any term of years or lives, to remove tenants, and make such allowances and abatements or deduction to the tenants, as to the said Thomas Hoare and Maziere should appear reasonable.

Among the creditors in the "unsettled estates" was a Mr. George Oakley. He was not one of those who *had *573 ratified the trust deed, and, in the year 1819, he filed a bill in the Court of Chancery in Ireland, to carry into effect the trusts of Sir Edward's will, for a sale of the unsettled estates, and for a receiver in the mean time. The suit went on slowly, but in 1823 a receiver was appointed over these estates. On the marriage, in 1824, of Captain Edward Hoare, the eldest son of Sir J. W. Hoare, the said Sir J. W. Hoare made a promise that he would leave the whole management of his estate to the captain, with the advice and assistance of the Rev. Mr. Hoare, his uncle; and this arrangement was in many instances strictly acted on. On the expiration of the insurance, in 1823, a new insurance for a like sum of 4000*l.* was effected by Maziere on the life of Sir J. W. Hoare, and Maziere paid the premiums out of the rents.

In 1828, a suit was instituted by Foley, one of the creditors of Sir J. W. Hoare, and judgment being given in his favour, Maziere was obliged to advance money to pay off the principal and interest, together with costs, taking assignments of the judgments to a trustee for himself.

The trust terminated in 1837, and in the first account there was a balance against Sir J. W. Hoare of 581*l.*; Maziere died in February, 1839, and the respondent, Henry White (now Lord Annaly), was one of his residuary legatees, and afterwards became his administrator, with the will annexed.

In September, 1841, Sir J. W. Hoare filed his bill against the respondent, as administrator, &c. of Maziere; charging against Maziere wilful default in the getting in of rents, general mismanagement of the trust, and especially misconduct in having made an abatement of the rent of Wise's farm, and in the omission duly to collect *the rents of Naskin and Dromerk. *574 The proceedings went on at considerable length, and an order was made for accounts. In 1852 Sir J. W. Hoare died. McDonnell, in December, 1854, took out, in his character of a

creditor of Sir J. W. Hoare, administration with the will annexed, and in 1855 filed his cause petition of revivor and supplement against the respondent. Answering affidavits were put in, accounts taken, and the cause was referred to the Master for inquiry.

It appeared from the evidence in the Master's office, that on 7th December, 1805, Sir Edward Hoare had demised lands, constituting a certain farm, to Mr. Wise, for three lives, at 494*l.* rent; that on the following day, Mr. (afterwards Sir) J. W. Hoare, executed a lease to Wise, reciting that of the preceding day, and in consideration of 1500*l.* demised the same lands for nine thousand years from and after the deaths of Sir Edward and Lady Hoare, at a rent of 350*l.* per annum; her Ladyship, who survived Sir Edward, died in 1816. In 1822, Wise made a formal complaint that the rent was too high; the complaint was communicated to Sir J. W. Hoare, but he refused his sanction to any abatement. Nevertheless, Maziere, with the full assent of Captain Hoare, and with the knowledge of Sir J. W. Hoare (who always complained of the abatement, but took no steps to prevent it), received a diminished rent. In the autumn of 1823 Sir J. W. Hoare came over to Ireland to inspect the property and examine the accounts, and while he was there Maziere made a distress on Wise's farm, which was replevied.

The Master, by his report in November, 1862, found Maziere guilty of wilful default as trustee, in not having enforced payment of rents, &c. and found various sums due on that account from his estate; but the same report allowed Maziere interest on the premiums of insurance * on the policy, and on the payment made in respect of Foley's judgment, as advanced out of his own funds.

Exceptions were taken by both parties to this report. The cause came on to be heard on the report on exceptions and for further directions. On the 28th February, 1863, the Lord Chancellor of Ireland made a decretal order, which in substance declared that Maziere had not been guilty of any wilful default as to the reduction of rent in the case of Wise's farm, and the Master's report was directed to be amended with relation thereto, but it was declared that there had been default in receiving the rents of two denominations of land, called Naskin and Dromerk, and certain sums were paid to be in the hands of the respondent, in

respect of other matters, as from the date of May, 1853, and the same were ordered to be paid, with 5*l.* per cent. interest thereon from that time, giving the respondent credit for all payments in respect of the policy of insurance, and directions were given accordingly, and costs apportioned on these findings.

Both parties appealed against this decree.

The Attorney-General (Sir R. Palmer) and The Solicitor-General, for Ireland (Mr. E. Sullivan, — Mr. A. H. Graydon was with them), for McDonnell. — The trustee here ought to have been held liable to make good the amount, which but for his default might have been received. It will be said that this was not a wilful default, and perhaps it was not in the sense of wantonly neglecting to receive the money, but it was wilful in the sense of not attempting to enforce payment when it might have been enforced; the trustee is therefore liable, *Tebbs v. Carpenter*.¹ In *Stiles v. Guy*,² * where two executors were sought to be * 576 charged with a debt due to the testator from their brother executor against whom they had never endeavoured to enforce payment, they asked for an inquiry to ascertain whether they could have recovered it. They did not go on with the inquiry; the Court held that they were bound to do so, even though they must have proved a negative; and as they had not done so, ordered them to pay the amount into Court, with interest from the testator's death. The Vice-Chancellor said, that "those who seek to exonerate themselves from payment of a debt due from a third person, ought to prove that that person could not have paid the debt." The case of *Maitland v. Bateman*³ was there referred to, where a trustee under a settlement had not enforced payment of a sum of 10,000*l.* payable under a covenant in the settlement. On a bill filed by the widow, an inquiry was directed whether the settlor, between the day of payment named in the covenant and the day of his death, was of ability to pay the 10,000*l.*, or any part thereof, and it was found that he never could have paid more than 4200*l.*, a breach of trust was declared, and the trustee, under these circumstances, was ordered to pay the sum of 4200*l.* into Court, with interest to be calculated from the death of the covenantor to the day of payment.

The trustee here cannot be allowed to treat himself as a person

¹ 1 Madd. 290.

² 16 Sim. 230.

³ 16 Sim. 233, n.

who has made advances to the estate, for if he had done his duty he could have recovered money exceeding the amount he has advanced, and then he would not have had any claim against the estate.

The rules as to the mode in which the calculation of what * 577 is due from him must be made, are laid down in * *Thornycroft v. Crockett*.¹ On all the balances in his hands interest must be allowed from the time he received the money.

It is no answer to this claim to say that the trustee reduced the rent of Wise's farm with the assent of Captain Hoare. No such assent could in such a case have any authority, and, from the beginning, any reduction was refused the sanction of Sir J. Hoare, who was the person beneficially interested under the deed.

Mr. Isaac Butt (of the Irish bar) and *Sir H. Cairns* (*Mr. Wickens* was with them), for *Mr. White*. — There has not been any default here in respect of which a personal liability ought to be fixed on the respondent. The case of *Tebbs v. Carpenter*² is really an authority in his favour, for there the decree was made against the trustee, because being offered the opportunity of showing that he was not in default, he would not enter into evidence on the subject. Here there was no difficulty of that sort, and the very case of the appellant himself shows that the full rent could not be obtained from Wise, that Captain Hoare, to whom his father had intrusted the management of the estate, was of opinion that no attempt to enforce payment of the full rent should be made, and though his father did not like the abatement, he, with full knowledge of all the circumstances, had himself expressed a wish that the tenants should not be put to inconvenience, and had during the whole time, by his acquiescence, justified the making of the abatement. *Lewin on Trusts*³ shows that under such circumstances personal liability will not be fixed on trustees.

Then as to interest, it was declared by Lord Chancellor * 578 * *Sugden*, in *Hynes v. Redington*,⁴ that "sums of money paid by the executor in mistake, or lost by his default, will not carry interest." Here there was neither default nor mistake of the executor.

The Attorney-General replied.

¹ 2 H. L. Cas. 239.

² 1 Madd. 290.

³ 4th ed. 457.

⁴ 1 Jones & L. 589, 603.

May 30.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this appeal is presented in a suit which was instituted by the late Sir Joseph Hoare, in the Court of Chancery in Ireland, in the year 1841, for the purpose of taking the accounts of a trustee named Maziere, long since dead, which accounts were to be taken as to certain estates comprised in a trust deed for the benefit of creditors, executed by Sir Joseph Hoare in the month of September, 1816, and of which Mr. Maziere was the trustee.

This trust was for a term of twenty-one years, and after payment of the creditors, the ultimate trust was for the benefit of Sir Joseph Hoare. It expired therefore in the year 1837, Mr. Maziere dying shortly afterwards. The suit was not instituted until the year 1841, four years after the death of the trustee. When instituted, it was very far from being rapidly prosecuted. A decree was made by the Court of Chancery in Ireland in the month of May, 1847, but little or nothing was done under that decree. In the month of November, 1852, Sir Joseph Hoare died. The suit was afterwards revived by his representative, the present appellant; and the account taken against the representative of the trustee was not, in fact, taken until the years 1856 and 1857.

It is important, in the first place, to observe, that although * it is perfectly true that no time runs as between the *cestui* * 579 *que trust* or beneficiary and the trustee, upon an express trust, so as to bar the remedy of the beneficiary, yet with respect to claims made by him against a trustee, the general rule of equity that encouragement is not to be given to stale demands is equally applicable. And in taking an account for the purpose of charging the trustee with personal liability (which is the object of the present suit), every fair allowance ought to be made in favour of the trustee, if it can be shown that the claim which is now sought to be enforced is one which arose many years ago, and one of the nature and particulars of which the beneficiary was at the time when it arose perfectly cognizant.

Now that observation will be found applicable to the whole of the subjects of the present complaint. The first and principal object of the appeal on the part of McDonnell was to charge the trustee, Mr. Maziere, with certain sums of money which constituted an abatement allowed by him to one of the tenants of the name of Wise from his rent, and which abatement began to be

made as early as the year 1823. It appears that Sir Joseph Hoare had granted a lease for nine thousand years (equivalent to a perpetuity) of a certain estate in Ireland, to a person of the name of Wise, reserving a payment which in reality was in the nature of a fee farm rent, but which rent, contrary to the ordinary practice of a fee farm rent, was very nearly equal, if not quite equal, to the rack rent of the land. Difficulties were experienced by the trustees in recovering the amount of this rent from Mr. Wise, and in the year 1823 the trustee made an abatement to Mr. Wise of forty guineas per annum out of his rent, and in so doing he acted with the knowledge of Sir Joseph Hoare, to whom the fact * 580 was immediately communicated; *and he acted also with the entire approbation of Captain Hoare, a relative of Sir Joseph, to whom Sir Joseph Hoare had, on his leaving Ireland, committed (as is proved by his own letters) the entire management and superintendence of the estates in the hands of the trustee. These facts are put beyond possibility of doubt by the correspondence. It appears that the circumstances were fully stated by the trustee, Mr. Maziere, to Sir Joseph Hoare. The fact that Sir Joseph Hoare had committed the superintendence of the estate to Captain Hoare is proved by the correspondence. It is also clearly proved that Sir Joseph Hoare was aware that Captain Hoare and the trustee had concurred in the propriety of making this abatement, and it is clear that Sir Joseph Hoare, although he certainly grumbled at what had been done, did not attempt, by any means, by any legal proceeding or otherwise, to question the legality or the propriety of what had been done by the trustees.

The Lord Chancellor of Ireland refused, under those circumstances, to charge Mr. Maziere's estate with the amount of this abatement, which was sought to be charged against it upon the ground that he had no right to make the abatement, and that the sum so abated might have been recovered if due diligence had been used. Having regard to the facts proved, and to the silence of Sir Joseph Hoare upon the subject, I think the fair inference will be that it was a prudent abatement, and one therefore that does not at all form a proper subject of complaint against the trustee. But besides that, I think it clear that it was done under the authority that Sir Joseph had committed to Captain Hoare. It would be infinitely too much for Sir Joseph's representatives to attempt now, to deny that authority which was admitted by

Sir Joseph *himself, and that in the act so done by his *581 agent Sir Joseph Hoare virtually acquiesced, inasmuch as no proceeding was taken to deny the validity of what had been done until the institution of this suit in May, 1841, about eighteen years after the transaction had occurred. I think, my Lords, upon those two grounds you will have no difficulty in concurring with the Lord Chancellor of Ireland, and in affirming his refusal to charge the trustee with this abatement as an act of wilful default.

I pass on now to the consideration of the subject of the cross appeal, for unfortunately the decree made by the Lord Chancellor of Ireland in this case has been the subject of two appeals. The subject of the cross appeal arises in this way. There were certain lands in the western part of the county of Cork, called Naskin and Dromerk, included in the trusts of this estate. They were also subject, in respect of the interest of Sir Joseph Hoare, to the claims of other creditors of Sir Joseph, who had not become parties to the trust deed. One of those creditors was a gentleman of the name of Oakley, and he appears in the year 1823 to have instituted a suit in Ireland, that being a creditor's suit against Sir Joseph Hoare and also against Peter Maziere, for the purpose of obtaining payment of his debt and the debts of other creditors similarly circumstanced. In the present suit of *Hoare v. White*, now *McDonnell and White*, the representatives of Sir Joseph Hoare have brought against Mr. Maziere a charge of wilful default in respect of those two estates of Naskin and Dromerk, and the allegation was that rents had become due for three or four years anterior to the month of November, 1823, which rents had not been recovered by Mr. Maziere, but might have been recovered by him if due diligence had been used. And accordingly it was sought, in the present suit, to charge Mr. Maziere's *estate as for his wilful default, to the extent of the rents *582 of those lands not so recovered.

Independently of an objection which I shall presently notice, it certainly does appear from the correspondence, that Sir Joseph Hoare was perfectly aware that lenity and forbearance had been used by the trustee with regard to the tenants of those estates, and in one of the letters of Sir Joseph Hoare, written at the beginning of the year 1823, and before the contemplated visit of Sir Joseph to Ireland, he particularly desires that the agent employed by the

trustees should act as gently as possible with regard to the rents of those western tenants, which would include of course those estates of Naskin and Dromerk.

It would be very difficult, therefore, I should submit to your Lordships, in the face of that express desire, and after this long lapse of time, to come now to the conclusion that you are at present so perfectly well informed of the facts as to be able to pronounce with satisfaction and confidence, that the circumstances of the country, or the condition of the estate or of the tenantry, did not warrant the forbearance that was exercised by the trustee. But fortunately it is not necessary that your Lordships should found your opinion merely upon that consideration, because it appears that in that suit to which I have already adverted, of *Oakley v. Hoare*, which embraced this matter, an application was made for a receiver in the month of November, 1823. That application appears to have been, at all events, acquiesced in, if not promoted, by Sir Joseph Hoare himself, and he made an affidavit upon that occasion, in the month of November, 1823, in which he specifies these arrears as being then due from his tenants, which

arrears his representative now seeks to convert into the
 * 583 subject of a charge of wilful default on the part * of the trustee. In pursuance of that affidavit, an order for a receiver was made in the suit of *Oakley v. Hoare*, and in conformity with the settled law of the Irish Court of Chancery, the duty of the receiver had reference not only to the future rents, but also to all the past arrears of the rent. In effect, therefore, the order appointing the receiver in *Oakley v. Hoare*, took away from the trustee of Sir Joseph Hoare, under the deed of 1816, all further control over those arrears, and all power of collecting them; and that was done with the acquiescence of Sir Joseph Hoare. It was equivalent, therefore, to Sir Joseph Hoare himself having transferred the enforcement of those very arrears from the trustee, of whose conduct he complains, to another person; and the trustee consequently cannot be held chargeable, seeing that the arrears were treated as rents that were to become payable, and seeing that those rents were made the subject of this transfer of ownership from the trustee, Mr. Maziere, to the receiver appointed in *Oakley v. Hoare*.

It appears, however, from the transactions in *Oakley v. Hoare*, that the receiver was no more able to recover the rents, than Mr.

Maziere had been, but that is a subject into which your Lordships need not enter, as it is sufficient for the present purpose to see that it is impossible to arrive at the conclusion that these rents might have been and ought to have been collected by the trustee anterior to the order appointing the receiver. And even if it had been possible to arrive at that conclusion, it would be impossible to follow that conclusion to its consequences at the present time, in the face of the order by which the arrears were transferred, in the manner I have mentioned, from the trustee, Mr. Maziere, to the receiver appointed in that suit of *Oakley v. Hoare*. But I submit to your Lordships, that in the Court below * these * 584 considerations were not properly attended to, and that there was a miscarriage therefore, in charging the trustee with the rents of those estates which were due at the time when the order for the receiver was made, and that no such charge ought to have been either allowed by the Master or confirmed by the Lord Chancellor. In that particular, therefore, I should advise your Lordships to reverse the order that has been made, and to strike out of the charge against the trustee the sum of money which has been carried to his debit by reason of this imputation of wilful default in respect of the arrears of rent upon those two denominations of land, anterior to the month of November, 1823.

The remaining subjects in this very complicated suit are some considerations relating to interest, and to costs. There is a claim made on the part of the appellant to interest on certain sums of money with which the trustee has been charged on the ground of wilful default, and from which part of the order no appeal has been made; but it appears that in the Court below, interest has been given against the trustee in respect of those sums only from the date of the Master's report, which I think was in the year 1862; they are sums of money particularly stated, which are found to be rents which the trustee, Mr. Maziere, ought to have received. If they were rents which the trustee ought to have received (which is established, and not questioned), then undoubtedly they are to be regarded as sums of money which were, or ought to have been, and therefore must be considered in this Court as being, in the hands of the trustee at the time of the termination of this trust, and they should have been added to the balance found due from the trustee at that time. And if it was proper, as I submit to your Lordships it was, and which in fact is not

*585 challenged, * to give to the beneficiary the interest on that balance found due from the trustee at the termination of the trust, those sums of money ought to be considered as equally in the hands of the trustee at the termination of the trust, and as bearing interest in the same way as the rest of the balance in his hands ; but in no other respect do I consider, nor I trust will your Lordships consider, that any interest account ought to be allowed. In fact the claim made on the part of the appellant is partly carried beyond the point in which I have expressed my concurrence, namely, that the particular sums of money which remain as an established charge against the trustee for wilful default ought to be treated as a portion of the balance in his hands at the time of the termination of the trust.

Now we have to consider (supposing your Lordships should agree with me) what the effect of these conclusions must be upon the costs of this suit, and upon these appeals. I submit to your Lordships, that the appeal fails wholly with respect to Wise's farm ; and your Lordships, I think, will concur with me, in thinking that the cross appeal succeeds entirely with regard to Naskin and Dromerk. In respect therefore of the cross appeal, it will be necessary to strike out of the Lord Chancellor's decree the sums of money given against the trustee on account of his alleged wilful default with regard to Naskin and Dromerk ; and the effect of striking out those words will be this : that that portion of the decree which gives the trustee his costs will then operate to include the costs incurred by the trustee by reason of the unfounded charge having relation to those two denominations of land. Then, upon the other subject, the figures must be varied according to the amount of the balance in the hands of

*586 the trustee at the termination of *the trust, namely, in the month of September, 1887 ; and the interest account will also of necessity be somewhat varied. But the computation and consequent rectification of the figures resulting from your Lordships' declaration is so easy, that it must be understood that those figures will be embodied in the order of your Lordships' House so as to render it wholly unnecessary to have any reference back to the Court below, and thereby to augment the great costs which these appeals have already inflicted upon the parties. Then I think that your Lordships will also agree with me, that seeing that the appellant fails in respect of Wise's farm,

but succeeds upon this portion of the appeal relating to the subject of the interest, and seeing that the cross appeal succeeds in the manner that I have mentioned, it will be very difficult to say any thing with regard to the costs of these cross appeals, other than to let them be regarded as balancing and equalling one another, and I am afraid that your Lordships can hardly see your way to making any other direction upon the subject of costs than that which I have already proposed.

My Lords, the result of the whole will be this, if your Lordships agree with me : that the Lord Chancellor's decision upon the subject of Wise's farm is affirmed ; that the Lord Chancellor's decision on the subject of Naskin and Dromerk is reversed ; that the Lord Chancellor's decision on the subject of the additional sums that ought to be added to the balance charged against the representatives of the trustee for wilful default, and not challenged by the respondent, will be varied to the extent of declaring that those sums ought to be regarded as moneys in the hands of the trustee at the termination of the trust, and as bearing interest in like manner as the rest of the balance in his hands. The consequential alteration * in the figures will be embodied in * 587 your Lordships' decree, and no order will be made upon the subject of the costs in either of these appeals. My Lords, I fear that my statement may have been wanting in clearness, but I trust that I have sufficiently brought out the facts of the case, and indicated the grounds of the judgment which I have proposed for your Lordships' adoption.

LORD CRANWORTH. — My Lords, so far from thinking that there has been any want of clearness in what you have heard from my noble and learned friend, I think it has been so clear that any attempt to add any thing further to it would be likely only to perplex. With reference to the subject of wilful default, I am quite satisfied to rest my judgment upon this, that these were defaults (if they were defaults at all) which occurred some seventeen or eighteen years before the termination of the trust, and which were not challenged for four years after the trust had determined. As there was perfect *bona fides* on the part of the trustee, I think it would be very mischievous to encourage the notion that a Court of equity would enter into any such question after that lapse of time.

LORD CHELMSFORD. — My Lords, I entirely agree with my two noble and learned friends.

Lords' Journals, 30th May, 1865.

1864. July 14, 15, 26. 1865. June 12.

WILLIAM SPREAD, *Appellant*.

WILLIAM MORGAN and Others, *Respondents*.

Election. Statute of Limitations. Practice. Appendix. Costs.

The doctrine of election is not properly a rule of positive law, but a rule of practice in equity. The knowledge of it is not therefore to be imputed as a matter of legal obligation.

Where a case of election arises, the person who ought to make it must be shown to have known of his duty to do so, and must be proved to have done such acts as amounted to an election.

Remaining in possession of two estates, held under titles not consistent with each other, affords no decisive proof of that kind. The rule is, "that if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference, cannot be an election to take the one, and reject the other." (*Padbury v. Clark*, 2 M. & G. 298, confirmed.)

Semble, per LORD CHELMSFORD. — A party having an equity to compel an election, does not forfeit that equity by delay in enforcing it.

Per LORD CHELMSFORD. — An election gives a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made.

The Appeal Committee cannot decide what documents are, and what are not, necessary to be printed in the appendix to a case. A question on this point though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The House would not afterwards hear it discussed, and refused to make any order as to the costs of the appendix.

The decision below being reversed, and the cause remitted, the Court below was left to deal with the general question of costs.

JOHN SPREAD was seised in fee of the lands of Ballynoran and Springfield, and by his will, in 1745, devised them to his son

William Spread the elder, for life, with remainder to his first and other sons in tail male, with divers remainders over.

This William Spread (called afterwards, for distinction's sake, the elder) was himself seised in fee of the lands of Ballycannon, Kilbeg, Coolnegerah, &c. and by settlement made on his marriage, in April, 1763, he conveyed * these last-mentioned * 589 lands to himself for life, remainder to trustees for a term of three hundred years, to raise 1000*l.* for younger children, and subject thereto to the use of his first and other sons in tail male, with divers remainders over. Richard Spread, the grandfather of the appellant, was the eldest son of this marriage. William Spread the elder died in 1775, and his eldest son, Richard, thereon entered into possession of the estates. In Michaelmas, 1793, he suffered a recovery of the lands comprised in the settlement of 1763, but did no act to bar the estate tail in the lands of Ballynoran and Springfield, comprised in the will of 1745. He married in 1793, but did not then execute any marriage settlement, but he executed one in 1794 after the birth of his eldest son William Spread (called William Spread the younger). This settlement of 1794 recited that Richard Spread was seised in fee of the lands of Ballynoran and Springfield, and also seised in fee of the lands of Ballycannon and Kilbeg, &c. and purported to convey all the lands to the use of himself for life, remainder to trustees for a term of five hundred years, to raise 3000*l.* for younger children, and, subject thereto, to his son William Spread the younger, for life, remainder to his first and other sons in tail male, remainder to his daughters as tenants in common in tail general, remainder to the use of the second, third, fourth, and subsequent sons of Richard Spread and his then wife, successively in tail male, remainder to the daughters of Richard Spread, with divers remainders over; and Richard Spread was to have power to charge the lands with 1000*l.* for his own use, a power which he afterwards exercised, in April, 1818, by a mortgage to one George Bland. And he covenanted with the trustees that he was seised in fee of all the said lands, and had good title to convey the same.

Richard Spread had by this marriage William Spread * (the younger); Richard Spread, who died without issue, * 590 2d May, 1823; Palms Spread, who died without issue in 1844; Thomas (the father of the appellant), who died in 1831, and five other children.

In 1819 Richard Spread granted to his eldest son, William Spread the younger, three annuities, amounting together to 300*l.* a year for life, charged upon the lands of Ballycannon, and afterwards granted him a lease for life of the lands of Ballynoran, at a rent of 300*l.* a year, with liberty to deduct thereout the amount of the three annuities.

Richard Spread the settlor died in May, 1831, on which William Spread the younger entered into possession of all the lands comprised in the will of 1745, and in the settlement of November, 1794.

In February, 1832, a bill was filed by all the parties interested, against William Spread the younger, praying for a sale of the premises, comprised in the trust terms of three hundred and of five hundred years, and for payment of the charges of 1000*l.* and 3000*l.* In this suit (known as that of *Westropp v. Spread*) it was assumed that Richard Spread, at the date of the settlement of November, 1794, was seised in fee of all the lands therein comprised; and a report of the Master, made in the course of the suit, stated the same as a fact.

In March, 1832, a suit was brought to enforce payment of the money secured to Bland on his mortgage, and this was finally satisfied when, in 1836, a sale was ordered in the suit of *Westropp v. Spread*. In the course of the proceedings for this sale, a case on the title to the property was, by the plaintiff's solicitor, laid before Mr. Serjeant Warren, who, in July, 1837, approved of the title to all the lands except those of Ballynoran and Springfield, which he stated could not be sold for payment of charges under the settlement of 1794, as Richard Spread was only tenant in tail

* 591 thereof when he executed * the settlement, and that William Spread the younger was, at the time of the opinion, tenant in tail thereof, under the will of John Spread, made in 1745. This opinion appeared to have been made known to all the parties concerned, and in January, 1839, William Spread the younger executed a disentailing deed of Ballynoran and Springfield. The Master adopted the opinion of Mr. Serjeant Warren, and these lands were declared not subject to the sale, all the other lands were not required, and those of Ballycannon were not sold. The sale produced enough to satisfy the order, and to leave a surplus of 507*l.*, which was paid into Court to the credit of the cause, and William Spread afterwards obtained an order for payment to

him of the dividends thereon. William Spread continued in possession of all the unsold lands, and in January, 1845, mortgaged the lands of Ballynoran and Springfield, and of Ballycannon and Kilbeg to James Heney, for 500*l*. The mortgage recited (among other things) the settlement of November, 1794, and that Richard Spread was seised in fee simple of all the lands therein comprised. This mortgage was, in November, 1845, transferred to William Morgan, from whom a further sum of 1700*l*. was borrowed.

On the 6th July, 1849, William Spread the younger made his will, by which he directed his debts to be raised out of Ballynoran and Springfield, charged certain annuities on those lands, one of which (100*l*. a year) was given to his daughter and her issue, and, subject thereto, he devised them to the appellant and his issue, with remainders over, and he made Frederick Newe executor and trustee under his will.

William Spread the younger died in September, 1849, without lawful issue. The appellant, whose other uncles had also died before that time without lawful issue, was his heir at law, and also the person entitled next in remainder to the lands comprised in the settlement of 1794.

* In April, 1850, Newe filed his bill against the appellant * 592 and others, to have the trusts of this will carried into effect. The bill prayed that it might be declared on what estates of the testator the several annuities and legacies were charged, and for an account, &c.

The appellant being then an infant, an answer was put in by his guardian *ad litem*, in November, 1850, and the only question then raised was as to the competency of William Spread the younger to make a will. An application was made on behalf of the appellant for a sale of the lands of Ballynoran and Springfield, which application was opposed by Newe. On the 19th November, 1852, an order was made for an issue to try the competency of William Spread the younger to make a will. Nothing was done on this order.

On the 28th November, 1858, the various parties having in the mean time agreed upon terms (the appellant no longer contesting the competency of William Spread), an order was founded upon them, whereby it was declared that the trusts in the will of William Spread the younger should be carried into execution, and that it should be referred to the Master to inquire and report on what

estates of him, William Spread the younger, the legacies and annuities given by his will, and also his debts, were severally charged and ought to be paid. Other proceedings took place, and in February, 1859, the whole matter came before Lord Chancellor Napier, who pronounced an order declaring that William Spread the younger had elected to confirm the settlement of November, 1794, and to take the lands of Ballynoran and Springfield under that settlement; that accordingly those who then represented his estate were bound to give effect to the same, and that such lands had been subject in equity to the trusts therein contained; that

the appellant was entitled in equity to an estate in fee simple in possession * therein, free from any encumbrances created by the will of William Spread the younger, and Morgan and the other respondents were ordered to execute a proper conveyance of the said lands to the appellant.¹ This decree was taken by appeal before the Lords Justices, who, on the 8th December, 1859, reversed the same, and dismissed the appellant's cause petition with costs, without prejudice to any application to be made by him to vary the order made in November, 1852. An application was accordingly made to the Master of the Rolls who, in February, 1860, refused the same. In April, 1860, the cause was heard on exceptions and on merits, and an order made in accordance with the above decision of the Lords Justices. This appeal was brought against the decree of the Lords Justices of the 8th December, 1859, and a consequent order made in April, 1860.

The Attorney-General (Sir R. Palmer) and The Solicitor-General for Ireland (*Mr. Sullivan, — Mr. McMahon* was with them), for the appellants. — The first question here is, whether William Spread the younger, the tenant for life, was, by the operation of the deed, put to his election. [It was admitted that the will of 1745 and the deed of 1794 did give rise to a case of election.] The next is, whether what he did amounted to an election. The difference as to consequences between election under a deed and under a will was considered in *Green v. Green*,² and it was there said that in an election against a marriage settlement as operating a contract, the principle, not of compensation, as under a will, but

¹ Drury's Cas. in Chanc. temp. Napier, 525; 9 Irish, Ch. Rep. 535.

² 19 Ves. 665, 2 Mer. 86.

of forfeiture must be applied. But whatever may be the distinction in that respect it is clear that the equitable rule as to election is as applicable to * rights created under a deed as * 594 under a will. The deed here did raise a case of election, and the question now is whether William Spread the younger must not be taken to have made his election, and to have elected to take under the settlement. The result of the authorities on this point is, that when a person is informed of the state of his title, and of his power to withdraw from the settlement, but he chooses to take advantage of it, he is thereby concluded. Lord Chancellor Napier thought that the acts of William Spread the younger showed that he had brought himself within the operation of this rule. That decision was right. Knowledge is assumed when the opportunity for knowledge exists, and there has been sufficient length of time to use that opportunity, *Butricke v. Broadhurst*,¹ and *Wake v. Wake*.² In the former of these cases, Lord Chancellor Thurlow, commenting on *Beaulieu v. Cardigan*,³ said that that case appeared to leave election open for fifty years, but that that must depend on the circumstances of each case. That principle was acted on in *Giddings v. Giddings*.⁴ In *Worthington v. Wiginton*,⁵ it was declared that to constitute a settled and concluded election there must be clear proof that the person was aware of the nature and extent of his rights, and that having that knowledge he intended to elect. But applying that doctrine itself to the circumstances of that case where the widow had done many acts as executrix, though the Master found that it would have been to her disadvantage to take under the will, it was held that she must be treated as having elected to take under it. Charging a property is an act of election. Conveying to a mortgagee with knowledge of all the * facts is an act of election. * 595 William Spread the younger did this; he had no life estate to convey, except under the settlement. Receiving the benefit conferred by the settlement as distinct from the will, when he knew what were his rights under the two, amounted to the act of election, and it was not necessary that he should be shown to be exactly aware of the rule of law. Dealing with the property as his own is itself an act of election, *Briscoe v. Briscoe*.⁶ Lord

¹ 1 Ves. Jun. 171, 3 Brown, Ch. 88.⁴ 3 Russ. 241.² 1 Ves. Jun. 335, 3 Brown, Ch. 255.⁵ 20 Beav. 67.³ Ambl. 533; 3 Brown, P. C. 277.⁶ 1 Jones & L. 334.

Chancellor Sugden there said,¹ "If another disposes of property belonging to me in favour of a third person, and gives to me property of his own, I am put to my election, either to take that which is given to me, and relinquish my own property, or to take my own and relinquish that which has been given to me; and if I deal with the property which has been given to me as my own, with a knowledge of the existence of the question of election, it is a clear deliberate act of election to take the property given to me." The knowledge of the duty to make an election cannot be denied when it is seen that there are two properties to be held by distinct and opposing titles; and the fact that they are so held is brought home, as it was here, to the knowledge of William Spread the younger by the deliberate opinion of an eminent lawyer, an opinion which was immediately acted on by the person in possession of the property. This case is therefore stronger than that of *Tibbitts v. Tibbitts*,² which shows that acquiescence and lapse of time will bind the parties.

But suppose the House should be of opinion that no election has actually taken place, then an election must be directed, and the respondents must be ordered to give compensation. [THE * 596 LORD CHANCELLOR.—If an order * of that sort is made, how far would the accounts go back?] There cannot be here any question as to the Statute of Limitations, for it was not till the appellant came into possession that he could raise the question. The case of *The Duke of Leeds v. Amherst*,³ acted on in many cases since, shows that all the assets of the person are liable, where he has wrongfully possessed himself of funds to which he was not entitled. The right to compensation is a charge upon the real as well as the personal estate.

Sir H. Cairns (*Mr. Chatterton* of the Irish bar was with him), for *Morgan*, the mortgagee. — The mortgagee here is entitled to say that there had not been at the time of the mortgage any election made, and consequently that his rights are not affected, so that if an election was made at any subsequent time, and compensation was necessary, it must come out of the general assets, and not out of *Ballynoran* and *Springfield*. If it should be said that there was evidence on both sides as to the election, then it is submitted on the part of the mortgagee, that the balance of evidence

¹ 1 Jones & L. 349.² 19 Ves. 656, 2 Mer. 96, n.³ 20 Beav. 239.

was in favour of Spread's desire to retain Ballynoran and Springfield.

The case of *Worthington v. Wiginton*¹ cannot, with reference to the decision on the facts there, be considered as any authority. There was an appeal against that decision; and on the case being opened before the Lords Justices, it was compromised.² Here the facts showed no intention to give up Ballynoran and Springfield, but the reverse. It is true that William Spread received the rents of Ballycannon and Kilbeg up to the last, but it must be remembered that he was entitled to them in a double character, for he was the heir at law of the settlor, * and would take * 597 those lands in that character if his life estate in them, under the settlements, was gone. So again, as to the barring of the estate tail in 1839, for he claimed to be the actual possessor of the property. Then, again, the discharge of the receiver from the lands of Springfield was nothing, for the receiver had been appointed under the erroneous idea that the decree bound those estates. There was no evidence whatever that Spread had seen Mr. Serjeant Warren's opinion, but if he had, it was immaterial, for though that opinion showed a difference in the nature of the title to the two estates, it never suggested in any way the idea of the necessity of election between them; and no man can be taken to be bound to be acquainted with that rule of equity practice, for it is not a rule of positive law, so as to have his rights affected by the non-observance of it. In the mortgage in 1855 there was a distinct statement that Spread was the holder of both the estates in fee, and there was nothing whatever in that which showed an intention to elect to hold under the will instead of holding under the settlement. On the facts, therefore, there is no ground for saying that Spread made any election.

Then as to the authorities; *Dillon v. Parker*³ shows that the party must be apprised of the obligation to elect, which certainly was not the case here, and that being so apprised of it, he deliberately elected; *Edwards v. Morgan*⁴ is strongly to that effect. If *Butricke v. Broadhurst*⁵ is properly reported, no case of election

¹ 20 Beav. 67.

² 20 Beav. 84, n.

³ 1 Swanst. 359. See Jacob, 505, and 1 Clark & F. 303, and the case at law, 2 Brod. & B. 12.

⁴ M'Clel. 541, 13 Price, 782; affd. 1 Dow & C. 104, 1 Bligh, N. S. 401.

⁵ 1 Vea. Jun. 171, S. C. 3 Brown, Ch. 88.

really existed there. Lord Thurlow there said, "If the plaintiff had filed a bill stating that she did not know the state of the fund, and desiring to have the debts and legacies paid and the property cleared, that she might elect to advantage; she might have done so." Spread was here in the same situation; he had not been called on to elect, and had done nothing which, without showing that he was bound to elect and had been required to elect, could be said to amount to an election.

Mr. Rolt (*Mr. C. Andrews* of the Irish bar was with him), for the other respondents. — As to the authorities, two may be added to those already cited, to show that a knowledge of the obligation to elect must be proved to have existed before the creditor could enter on the discussion whether what was done amounted to an election. *Rathborne v. The Earl of Aldborough*¹ is the first. It was there said,² "Earl John may have known his legal rights, but not his equitable obligations"; and then as an intention to elect had not been distinctly shown and acted on, it was held that none had taken place. In *Padbury v. Clark*,³ it was held that on a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for, if a party so situated, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other. Apply that rule here, and there is no ground whatever for saying that there has been an election. But further, that case also decided that dealing with one property by the way of mortgage where the party to be affected, and having the right to call for the election, knew of it, but did not call for the election, such dealing will not avail to prove an actual election against the receipt of the rents and profits of the other property.

As to forfeiture or compensation, it is clear that, even where there has been an election, if a man elects to take under an inferior title, there is no forfeiture of the other, but a mere claim for compensation is established. Then what is that compensation to come from? In *Greenwood v. Penny*,⁴ the heir elected to take against the will, and required the executors to complete a contract

¹ Hayes, 207.² Hayes, 216.³ 2 Macn. & G. 298.⁴ 12 Beav. 403.

by the testator for the purchase of a freehold estate, and it was conveyed to him ; he nevertheless received great advantages under the will, and it was held that the parties disappointed by the election had no lien on the purchased estate for the amount received, but that they were entitled to prove against the general estate of the heir for the whole amount received by him under the will. [THE LORD CHANCELLOR. — No lien on that particular estate, but was not the general estate liable to make compensation for those amounts?]

The appellant has no right to raise the question of election. There is no proof that he ever insisted on his right to compel an election. He was in that respect guilty of laches, and is therefore barred from any right to support the present claim.

If any right to compensation at any time existed, it was in the nature of a debt, of a simple contract debt, and is now barred by the Statute of Limitations.

The Attorney-General, in reply. — Where a case of election exists, there is no authority which requires that the party bound to make the election * should be formally required * 600 to do so. If the person so acts as to do what amounts to an election, he is bound. *Butricke v. Broadhurst* is decisive on that point ; and though it is true that the remark quoted on the other side was uttered, Lord Thurlow held that under the circumstances there an election had been made. The circumstances there were not so strong as they are here.

1865. June 12.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, this is an appeal from an order of the Lords Justices of Appeal in Ireland, reversing the decree of Lord Chancellor Napier, made in the suit instituted by the appellant. By that decree, dated the 7th November, 1859, it was declared that William Spread did in his lifetime elect to confirm the settlement of 1794, and to take the lands of Ballynoran and Springfield under that settlement.

This was reversed by the Lords Justices of Appeal, on the ground solely of a prior decree in a cause of *Newe v. Spread*, in which the appellant was a defendant, and by which decree the Lords Justices considered that the appellant was precluded from raising a case of election against William Spread and those claiming under him.

The facts are of a complicated nature, and some short statement of them is necessary to render any opinion intelligible.

In the year 1794, a settlement was made by Richard Spread, the father of William Spread.

It proceeded on a recital that Richard Spread was then seised in fee of the lands of Ballynoran and Springfield, in the county of Cork ; and also of several other estates in the same county ; and

it conveyed all these lands to the use of Richard Spread for * 601 life, with remainder * (subject to an annuity for his widow)

to trustees for a term of years, upon trust, to raise 3000*l.* for younger children, with remainder to William Spread for life, with remainder to his first and other sons successively in tail male, with remainder to his daughters as tenants in common in tail, with remainder to the first and other sons of Richard Spread, by Susanah his wife, successively in tail, with remainder over.

The whole of these lands, exclusive of Ballynoran and Springfield, were subject to judgment debts and some prior encumbrances.

Richard Spread the settlor died in 1831. On his death, William Spread entered into possession of all the estates comprised in the settlement. In 1832, a suit was instituted for the purpose of raising the portions of younger children ; and in 1836 a decree was made for sale of a portion of the settled estates.

It was then discovered that Richard Spread the settlor was, at the time of settlement, tenant in tail male of the lands of Ballynoran and Springfield.

A case of election, therefore, arose against William Spread. If he determined to withdraw from the lands of Ballynoran and Springfield, and not to confirm the settlement of 1794, he became bound to make compensation to the parties entitled under that settlement to the extent of the value of his own interest under the same, provided the value thereof did not exceed the value of the lands of Ballynoran and Springfield.

The question which then arises is, did William Spread make any election during his life ? And this must be answered by considering the effect of his acts and conduct subsequently to the discovery of the entail.

William Spread continued in possession of all the lands * 602 comprised in the settlement which remained unsold ; * and in January, 1839, he executed a disentailing deed of

Springfield and Ballynoran, and declared the uses to himself in fee.

In the month of January, 1845, he executed a mortgage of the fee simple of the lands of Ballynoran and Springfield, and of his life estate in a certain portion of the other lands comprised in the settlement of 1794, to one James Heney, to secure 500*l.* and interest. And this mortgage was afterwards transferred to one William Morgan, who advanced to William Spread the further sum of 1200*l.* on the security. This mortgage deed recited the entail of Ballynoran and Springfield, and the disentailing deed.

By various other acts, William Spread asserted his right and interest as tenant for life of all the estates comprised in the deed of 1794 ; and he continued in possession and enjoyment of those estates until the time of his decease, on the 20th September, 1849.

It is material to observe that there is nothing to prove that William Spread was informed of his equitable obligation to elect between the entailed estates and the other estates comprised in the settlement. In the opinion of Mr. Warren, which first stated the tenancy in tail, nothing is said of the obligation to elect.

It is true, as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity ; election, as a question of intention, of course implies knowledge. There may be a series of unequivocal acts, from which an intention to elect, and the fact of actual election, may be inferred ; but under the circumstances of the present case, it does not appear to me that any such inference can be drawn. William Spread continued in the possession and enjoyment of the settled estates *until the *608 time of his death, but this circumstance furnishes no conclusive proof of any intention to take the lands of Springfield and Ballynoran under the settlement, inasmuch as he had mortgaged these lands to Mr. Heney, as tenant thereof in fee simple ; and still less do the facts of the disentailing deed and mortgage afford proof of an intention to take against the settlement, inasmuch as he continued to enjoy, and to act as the owner of all the other estates which were comprised in it.

The first inference was much pressed, and it was urged that having continued in the enjoyment of the settled estates for many

years after the discovery of the real nature of his title, William Spread could not be heard to say that he had not elected to take under the settlement. But I concur with Lord Cottenham in opinion that if a party who is bound to elect between two estates, continues without being required to elect, in possession of both, such possession and enjoyment, inasmuch as it affords no proof of preference, cannot be held to be an election to take one of the estates and to reject the other. My opinion is, that William Spread believed he was entitled to the enjoyment of both estates, that he was ignorant of the equity to which he was in fact subject, and that he did not intend to take either of the estates in preference to the other.

The conclusion therefore is, first, that a case for election existed and still exists ; but secondly, that William Spread did not make, and cannot be taken to have made, any election ; and thirdly, that those who claim under his will an interest in the estates of Ballynoran and Springfield, are bound to make compensation for the value of the interest so claimed by them to the parties who are entitled under the settlement. But before effect is given to

* 604 this conclusion, it is necessary to consider * the ground on which the Lords Justices of Appeal have reversed the decree of Lord Chancellor Napier.

For this purpose it is necessary to state that William Spread, by his will dated the 6th day of July, 1849, and which was duly executed and attested for the devise of real estates, charged the estates of Ballynoran and Springfield with the payment of his debts and legacies, and also with a perpetual annuity of 100*l.* to his daughter, Mrs. Sullivan and her issue, and subject thereto he gave the same estates to the appellant ; and he appointed one Frederick Newe, and another person, to be the trustees and executors of his will.

At the time of the death of William Spread (who died without leaving issue), the appellant being the eldest son of Thomas, who was the fourth son of Richard Spread (his first, second, and third sons being dead without issue), became and was entitled as tenant in tail male, in possession to the estates comprised in the settlement of 1794. Shortly after the death of William Spread a suit was instituted by Mr. Newe, as trustee and executor, against the appellant and others entitled under the will of William Spread, for the purpose of having his estate administered, and the trusts

of his will carried into execution by and under the direction of the Court. The answer of the appellant, who was then an infant, was put in by his guardian, and it raised an issue as to the sanity of the testator, William Spread. But on the appellant attaining the age of twenty-one years, he admitted the sanity of the testator, and assented to a decree for the administration of his estate. That decree was in the usual form, and it directed an inquiry as to the estates of the testator which passed under his will, and were charged with the payment of his debts and legacies.

There was no adjudication, therefore, as to the estates *of Ballynoran and Springfield having passed under the will * 605 of William Spread. That was the subject of inquiry only, and under that inquiry the case of election might have been raised, and the appellant might have contended that William Spread had no title to devise the lands of Ballynoran and Springfield, inasmuch as they were bound by the trusts and the settlements. But the Lords Justices of Appeal appear to have held that the appellant, by consenting to the decree in *Newe v. Spread*, had conclusively admitted that the testator had power to dispose of the lands of Ballynoran and Springfield, and that they passed both at law and equity under his will, and were subject to the trusts thereof. This, however, is not the result, or the legal effect of the decree, and as I have already observed, there is nothing in the decree which involves any judicial determination as to the testator's ownership of the lands in question.

I am of opinion, therefore, that this decree was no bar to the relief sought by the appellant in the present suit, and that it contains no judicial determination of any of the questions now raised by the appellant. I must, therefore, advise your Lordships to reverse the decree of the Lords Justices of Appeal.

This reversal brings us to consider whether the decree of Lord Chancellor Napier ought to be affirmed; and for the reasons which I have already given, I must advise your Lordships that this decree also ought to be reversed. Lord Chancellor Napier came to the conclusion that William Spread did, in fact, elect and take under the settlements. The Lord Chancellor appears to have considered that the fact of election must be inferred from his continuing in the enjoyment of the settled estates. But in my opinion the better principle is that which is furnished by the judgment of Lord Cottenham.

* 606 *Great injustice might be done if it were presumed, from the fact of continuing in possession, that a party intended to decide a question which it does not appear that he was ever required to consider.

I must, therefore, advise your Lordships to reverse the order of the Lords Justices, and also the decree of the Lord Chancellor. The proper form of your Lordships' order remains to be considered. I think it should reverse the decree of the Lords Justices and of the Lord Chancellor, and should then declare that William Spread became and was, on the death of his father, Richard Spread, bound to elect between his title as tenant in tail to the lands of Ballynoran and Springfield, and his title as tenant for life to those lands and the other lands comprised in the settlement of 1794, and declare that, inasmuch as in the judgment of this House, William Spread did not make any election during his life, it is competent to the defendant, William Morgan, and the other defendants claiming under the will of William Spread, to make such election; and if they shall elect to take the estates of Ballynoran and Springfield, to the extent of their interest in the same, against the settlement, declare that the real and personal estate of William Spread is applicable to the extent of the amount of the receipts of William Spread as tenant for life of the other estates under the settlement, to make good to the parties entitled under such settlement, the full value of the lands of Ballynoran and Springfield, and that all proper accounts ought to be directed for the purpose, including accounts of the real and personal estates of William Spread, and of the moneys received by him as tenant for life of the other estates in such settlement. And with these declarations remit the cause to the Court below.

* 607 *LORD CRANWORTH, after stating the facts of the case, and the nature of the question raised on them, said: In the first place, it is necessary to dispose of the question arising out of the prior decree in *Newe v. Spread*, for if the Lords Justices were right in treating that as a bar to any relief whatever in the suit instituted by the appellant, it is unnecessary to consider whether the relief given by Lord Chancellor Napier in that suit was, or was not, warranted. But I cannot concur with the Lords Justices of Appeal in the view which they took of the case. Where a question has once been decided by a Court of competent juris-

diction, the same question cannot be again raised between the same parties, in the same way, in the same Court, or indeed in any other Court, unless by way of appeal. The Lords Justices of appeal in Ireland thought that this principle precluded them from looking into the question raised by the appellant in his cause petition. But this, I think, was a mistake. The question raised by the appellant in his cause petition was, whether William Spread, his uncle, was not bound to elect between his title as heir in tail male under the will of 1745 to the lands of Ballynoran and Springfield, and his title as tenant for life of these same lands, with several other estates under the settlement of 1794; and further, whether being bound so to elect, he had not in his lifetime elected to take under the latter title. It surely cannot be contended that these questions were concluded, or even affected by the decree in *Newe v. Spread*. By that decree the appellant is certainly bound, for he was a consenting party to it; but all which it decided was, that the trusts of the will of William Spread should be performed, and with that view the necessary accounts should be taken, and that the * Master should inquire, and state out of what *608 estates of the testator the debts, legacies, and annuities of the testator ought to be raised. On that reference it was open to the appellant to show before the Master that no debts, legacies, or annuities ought to be raised or paid out of the estates of Ballynoran and Springfield, which Richard Spread included, or purported to include in his settlement of 1794, on the ground that the testator had no power so to charge these lands. The Court below seems to have proceeded on the ground that the appellant must be taken, by consenting to the decree, to have admitted that the testator had power to dispose of the lands of Ballynoran and Springfield, which were included in the settlement of 1794, inasmuch as there were no other lands on which his will could operate. But there was no judicial *constat* that the testator had no other lands of Ballynoran and Springfield, besides those included in the settlement of 1794; and the language of the decree is properly and cautiously worded, according to the form in ordinary use, so as to bind no one to any thing except the validity of the will, and of the trusts, so far as there might exist property, by means of which those trusts could be carried into execution. To this extent the appellant was bound when he filed his cause petition; but he was bound no further, and therefore he was at full liberty to raise a question not touched

by what alone had been decided. I may remark, though that is hardly material, that the Master had not made his report when the appellant instituted his proceedings, and the decree founded on that report, and, for the first time, declaring that the debts and legacies under the will of the testator were validly charged on the lands in question, was not made until four months after the decree of the Court of Appeal dismissing the appellant's suit,

*609 *and considerably more than a year after the decree of Lord Chancellor Napier.

Being thus of opinion, that the decree of the Court of Appeal cannot be supported, I will next consider whether the decree of Lord Chancellor Napier was correct. Two questions were raised before him: first, whether the facts were such as to raise against the said William Spread, deceased, a case of election and security; if they were, then, whether he did elect to take under the settlement. We are relieved from any difficulty as to the first point, for, at the hearing at the bar, it was admitted that a case of election was raised, and the only question therefore is, whether William Spread did, in fact, make his election to take under the settlement. Lord Chancellor Napier decided that he did.

In order to determine whether that decision was right, we must look to all the facts of the case, with reference to the acts and deeds of the party bound to elect. The obligation to elect arose on the death of Richard Spread in May, 1831, when William Spread became entitled in possession to Ballynoran and Springfield as tenant in tail male, if he claimed under the will in 1745, or to those lands, with Ballycannon and the others, as tenant for life if he claimed under the settlement of 1794.

Immediately on the death of Richard, William entered into possession of the whole of the lands which Richard, his father, settled, or purported to settle, in 1794, believing that he was seised in fee of the whole.

William, however, did not long retain possession, for in the year 1832 a creditor who had obtained a judgment against him issued writs of elegit, and thereby obtained possession of certain parts of the settled lands of which the sheriff put him in possession, as being one half of the lands to which William was entitled;

*610 and *about the same time, the Court of Chancery, by its receiver, took possession of the rest of the lands in the cause which had been instituted in February, 1832, for raising the

sums charged on the settled estates, including Ballynoran and Springfield.

So matters continued to the sale, under the decree of June, 1836. That sale included a part of the lands held by the elegit creditor, whose demand was finally satisfied ; it did not include Ballynoran or Springfield, nor did it include Ballycannon, which was part of the lands of which Richard was seised in fee, when he made the settlement of November, 1794. From the time when the sale was completed, William Spread remained in possession till his death, as well of Ballynoran and Springfield, as also of Ballycannon. He also obtained an order, dated the 30th of November, 1843, for payment to him of the dividends to accrue due on a sum of 507*l.* 11*s.* 2*d.* Three and a half per cent. stock standing in Court to the credit of the cause in which the sale was made, being the balance of the purchase-money which remained after satisfying all charges and costs.

The true state of the title had been ascertained by the opinion of Mr. Serjeant Warren, given on investigating the abstract of title prepared with a view to the sale under the decree of June, 1836. That opinion bears date the 17th of July, 1837, and on the 2d of January, 1839, William Spread, acting no doubt on that opinion, executed a disentailing deed of Ballynoran and Springfield, declaring the uses to himself in fee.

The result of all these facts is, that from the time when Mr. Serjeant Warren gave his opinion in July, 1837, William Spread was certainly aware of his title, and with full knowledge of it he claimed to retain, and did, during the whole of his life, retain all the benefits created in his *favour by the settlement of * 611 1794. If, therefore, this is sufficient to enable the Court to declare that he made his election to accept the settlement in lieu of his title under the old entail, the decree of Lord Chancellor Napier was right ; but the circumstances seem to me to show that William acted in ignorance of the rule of equity, which bound him to elect. He thought he had a right to claim, and he intended to claim both estates, and the question is whether in these circumstances the Court can say that it will understand him to have made any election at all.

The ground on which the Court holds a person in the position of William Spread bound to make his election is, that it reads the settlement as if it contained a condition that all persons taking

benefits under it should give effect to its provisions as to the whole of the property over which the settlor purported to exercise dominion. If such a condition is expressed, then no injustice can be done by holding that a person taking the benefits of the settlement shall not set up a title to any part of the settled property adverse to the title of the settlor; he knows the conditions on which alone he can enjoy the settled property, and knowing them he chooses to enjoy it; he is therefore plainly bound by the conditions. But when no such condition is expressed, if in fact he is ignorant of the rule of equity which implies it, can the Court treat him as if he had known it, and say that he has made an election which he did not intend to make? I think not. It is true that he knows, or may know, the state of his title, and that title may be such as imposes on him the duty of electing. But unless he is acquainted with the rule of equity which obliges him to elect, I do not see how it is possible to say with truth that he has made an election;

*612 he cannot have done that, if he was *unaware that he was under any obligation to do it. The injustice of holding a party to have made an election in such a case might be extreme in cases where the difference in value between the two properties is very great.

That William Spread did not intend to elect to take the benefits conferred on him by the settlement, and to give up his title as tenant in tail, afterwards converted into a fee simple in Ballynoran and Springfield, seems to me clear, not only from the mortgage he made to Heney, and afterwards to Morgan, in which he expressly asserts his title in fee simple to those lands, and deals with them accordingly, but also from his will, whereby he treats himself as absolute owner of them, and devises them as being the owner.

It is however certainly true, that he remained in possession of the unsold settled lands up to the time of his death, as well as of the dividends arising from the small balance produced on the sale beyond what was required for satisfying its objects; and it was argued that on the authorities this must be taking as conclusively showing that he had made his election, it being certain that for the last twelve years of his life, and upwards, while he was thus in possession, he had become aware from Mr. Serjeant Warren's opinion, that he had a title under the will of 1745 to Ballynoran and Springfield paramount to that under the settlement of 1794.

I do not, however, think that the authorities establish any such general proposition. There are undoubtedly many cases in which, from the circumstance that the person bound to elect has, for a long series of years, taking that to which he was only entitled if he claimed under the will, or under the settlement, has been held to have made his election between them. These decisions may have been quite correct, for the Court may * have properly * 613 inferred from the facts of those cases that the person bound to elect knew the obligation which the doctrine of equity cast upon him, and then his conduct might show conclusively that he intended to make an election. On no other principle can they be supported. This was (as I understand the case), the ground on which the Master of the Rolls founded his decision in *Worthington v. Wiginton*,¹ on which so much stress was laid in the argument at your Lordships' bar. It was not merely that the widow accepted the benefits given to her by the will of her husband, but that she did so knowing that she could not consistently with that enjoyment, set up her own adverse title to the stock. His Honour took pains to show that the widow had not, by the mode in which she dealt with the stock, intended to assert any title to it adverse to her husband's will.

The true doctrine is very correctly stated by Lord Cottenham in *Padbury v. Clark*.² His Lordship there says, "If a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference, cannot be an election to take the one and reject the other." That was exactly what was done by William Spread in this case, and I am unable therefore to concur with Lord Chancellor Napier in his view of this case.

I concur therefore with my noble and learned friend on the Woolsack, in thinking that the decree of Lord Chancellor Napier, and that of the Court of Appeal, must both be reversed, and that the case must be remitted back to the Court of Chancery in Ireland with a declaration to the effect that has been stated by the Lord Chancellor.

* LORD CHELMSFORD. — My Lords, my noble and learned * 614 friend on the Woolsack has so fully stated the facts and circumstances of this case, that agreeing with him and my noble and

¹ 20 Beav. 67.

² 2 Macn. & G. 298, 306.

learned friend (Lord Cranworth), as I do, it will be necessary to make only a few additional observations.

It being admitted that William Spread was in a situation to be put to his election, to take under or against the deed of 26th November, 1794, the material question to be determined is whether he did in fact make such election.

Lord Chancellor Napier, by his decretal order upon the cause petition, filed by the appellant, declared that William Spread in his lifetime did elect to confirm the indenture of settlement of the 26th November, 1794, and to take the lands of Ballynoran and Springfield, that the appellant was entitled in equity to those lands, and that such of the respondents as were necessary parties should execute proper conveyances of the same.

Upon an appeal from this order, the Court of Appeal, without touching the question of election, held that the decree in the case of *Newe v. Spread* was a conclusive bar to the relief sought by the appellant in his cause petition, which was therefore dismissed with costs.

With great respect to the learned Judges of the Court of Appeal, I see no ground for this summary mode of disposing of the case. The decree in *Newe v. Spread*, according to the opinion of Lord Cottenham in *Bainbrigge v. Baddeley*,¹ would only be a bar to the appellant's claim in his cause petition if the subject matter adjudicated upon were the same in both proceedings. But the decree in the former case was merely that the trusts of William Spread's will be performed, and that it be referred to the Master to inquire and report on what estates the legacies, annuities, and debts of the testator were charged, and out of which they ought to be raised and paid. It is true that the prayer of the bill in this suit was, that such of the debts, legacies, and annuities as the lands of Springfield and Ballynoran should appear to be subject to, might be paid thereout in such manner as to the said Court should seem fit. But how, even with this proof, that upon the reference to the Master, he would have to consider whether amongst the estates to be charged with the debts and legacies, Springfield and Ballynoran were to be included, it could be said that the decree adjudicated upon the question of election under the deed of the 26th November, 1794, I am at a loss to understand. In the words of Lord Cottenham, in *Bainbrigge v. Baddeley* (2 Phill. 709),

¹ 2 Phill. 705.

"The question to be considered is whether, if the bill had been silent as to the former proceedings they could have been pleaded in bar to the present bill. For this purpose the plea must have averred that the former suit was for the same matter." The Court of Appeal, therefore, ought not to have held the appellant to be concluded by the decree in *Newe v. Spread*, but ought to have considered and determined the question, whether Lord Chancellor Napier was right in holding that William Spread had, with full knowledge of the state of the title, elected to take under the settlement of 1794.

In order that a person who is put to his election should be concluded by it, two things are necessary. First, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them. Second, an intention to elect manifested, either expressly, or by acts which imply choice and acquiescence.

In this case William Spread was ignorant of his title * to the lands of Ballynoran and Springfield till after Mr. *616 Serjeant Warren's opinion in 1837, therefore any proof of acquiescence in the settlement of 1794, which could amount to election, must be sought for subsequently. But I do not find any unequivocal act done by William Spread after that period which indicates his intention to claim under the settlement, instead of insisting upon his permanent title to the lands of Ballynoran and Springfield. On the contrary, every thing done by him afterwards appears to show that he considered himself entitled to have the benefit both of the settlement and of his own entailed lands.

The language of Sir Thomas Plumer in the case of *Dillon v. Parker*¹ may, with some slight alteration, be applied to this case. "Taking both estates, enjoying that which was his own, and also that given to him by his son, how can it be said that he relinquishes one, and elects to take the other? Has he not rather elected to take both?" And again: "With reference to intention, therefore, the evidence contained in these transactions, of his intention to retain his own estate, is at least as strong as the evidence of his intention to accept the property given to him by his son, derived from the mortgage and other acts of ownership exercised over it. How then can the Court declare that he elected to take the one and renounce the other?" The doctrine on this sub-

¹ 1 Swanst. 359, 380.

ject is very clearly and correctly stated by Lord Cottenham in the passage cited from his judgment in *Padbury v. Clark*, by my noble and learned friend Lord Cranworth.

There are two minor points which were raised in the argument for the respondents, which, as the case is to be remitted back to the Court of Chancery in Ireland, may be shortly noticed.

* 617 * It was insisted that the appellant was prevented by his laches from now insisting upon an election. No authority was produced for the position that a party having an equity to compel an election, forfeited that equity by delay in enforcing it. The cases which were cited upon this point, applied to the person who has the right of election losing it by acquiescence, and not to the person who has the right to compel an election.

Again, it was said that the right of the appellant at the utmost was, to receive compensation; that this was a simple contract debt, and that therefore the Statute of Limitations had run against it. To which it was answered that the right to compensation was a charge upon the real estate, and therefore the Statute of Limitations was out of the question. But even supposing the compensation to be in the nature of a simple contract debt, the claim to it can only arise when an election is made, and the statute can only begin to run from that time. No election has hitherto been made, and therefore no debt at present exists upon which the statute can attach.

I agree that the decrees of Lord Chancellor Napier and of the Court of Appeal ought to be reversed, and the case be remitted back to the Court of Chancery in Ireland, with the declarations suggested by my noble and learned friend on the Woolsack.

The Attorney-General. — Under the decree of the Lords Justices, the cause petition of the appellant was dismissed with costs, and the payment of these costs has been exacted. Of course they will be repaid. The respondents presented a joint supplemental appendix in this case, in addition to the original joint appendix,

in which they printed various documents, some of which
* 618 were of * a subsequent date to the institution of this suit, and which therefore were not properly evidence in the case.

A petition was presented to your Lordships to expunge those immaterial documents so improperly introduced, but the appeal committee ordered those costs to be reserved until the decision

upon this appeal, and of course we now ask for those costs to be repaid.

Mr. Rolt opposed this application.

Sir Hugh Cairns, on behalf of the mortgagee, asked their Lordships to direct by their order that he should be paid the costs of this appeal. He appeared only to contest one proposition, as to which he succeeded, namely, that no act of election had been made.

Mr. Rolt suggested that that might be left to the Court below.

THE LORD CHANCELLOR. — As to the costs of the appendix, it was almost impossible to determine that question in the appeal committee without hearing the appeal. It was there stated that many documents were included in the supplemental appendix which were irrelevant and unnecessary. To determine whether they were relevant or necessary, would have been beyond the usual scope of the inquiry of the appeal committee. Therefore there was hardly any other course to adopt than that which has been adopted. But I think it is a matter of regret, that, as the principal part of the appeal was of the nature of a reference, this point with respect to the relevancy of the doctrines printed in the supplementary appendix, should not have been brought to your Lordships' attention during the argument at the bar. And I think that your Lordships * will agree with me that * 619 we cannot now have a supplemental argument upon this matter. Upon these grounds, therefore, my Lords, I would submit to your Lordships to make no order as to the subject of costs upon that point.

With regard to the other point mentioned by the Attorney-General, namely, as to the costs of the appellants on their petition of appeal, as we have reversed the order, I take it that it follows as a matter of course that the repayment of those costs would be directed, in the usual way ; but the order as to the costs is always left to be made by the Court below following the declaration of your Lordships.

My Lords, with regard to the third point which has been mentioned, namely, the costs of the mortgagee, I think it must be left

to him when the respondent makes his election, to apply to the Court below. I would, therefore, submit to your Lordships, that beyond the order which I have proposed, there should be a declaration that any costs which have been paid under the order which is now reversed, ought to be repaid.

It was ordered — that the decree of the Court of Appeal of the 8th December, 1859, and the decretal order of the Lord Chancellor of Ireland of the 7th February, 1859, be reversed. And it is declared that William Spread the younger was, on the death of his father Richard Spread, bound to elect between his title as tenant in tail to the lands of Ballynoran and Springfield, and his title, as tenant for life, to those lands and the other lands comprised in the settlement of November, 1794. And it is further declared, that inasmuch as in the judgment of this House the said William Spread the younger did not make any elec-
 * 620 tion during his lifetime, it * is competent to the said William Morgan, and to the other defendants in the cause of *Neve v. Spread*, claiming under the will of William Spread the younger, to make such election. And if they shall elect to take the said estates of Ballynoran and Springfield, to the extent of their interest in the same, against the settlement, it is further declared that the real and personal estate of William Spread the younger is applicable to the extent of the amount of the receipts of the said William Spread the younger, as tenant for life of the other estates under the said settlement, to make good to the parties entitled under such settlement, the full value of the said lands of Ballynoran and Springfield; and that all proper accounts ought to be directed for the purpose, including accounts of the real and personal estate of the said William Spread the younger, and of the moneys received by him as tenant for life of the other estates in such settlement. And it is further declared, that any costs which may have been paid by any of the parties, under the decree or decretal order hereby reversed, ought to be repaid to the said parties. And with these declarations that the cause be remitted.

Lords' Journals, 12th June, 1865.

*BLADES v. HIGGS.

* 621

1865. May 16, 18; June 18.

WILLIAM BLADES, *Appellant*.WILLIAM HIGGS and Another, *Respondents*.*Game. Title to Property.*

Title to property created merely by the act of reducing a thing into possession, necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property.

Game chased and killed on the land of A., is his property.

Therefore where a stranger, without A.'s permission, killed coney on the land of A., and immediately took them up and carried them away, and sold them to a third person, it was held that the servants of A. were justified in taking possession of them as being the property of A.

Rigg v. Lonsdale, 11 Exch. 654; 1 H. & N. 923, approved. Also *Sutton v. Moody*, 1 Ld. Raym. 250; Comyns, 84; 12 Mod. 144, 145. But, per LORD CHELMSFORD, as to the declaration in the latter case that "If A. starts a hare on the ground of B., and B. hunts it into the ground of C. and kills it there, the property is in A. the hunter," *Quære*.

THIS was an appeal under the Common Law Procedure Act, 1854. The case stated the following facts.

In October, 1850, the appellant brought an action against the respondents for converting the plaintiff's goods, that is to say, rabbits and dead rabbits. A second count charged them with assaulting him, and taking from him his goods, that is to say, rabbits and dead rabbits. The defendants pleaded, first, not guilty. Secondly, that the goods were not the plaintiff's as alleged. Thirdly, that the plaintiff, at the time when, &c. had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, without the leave and license, and against the will of the said Marquis, *that the plaintiff * 622 was about to carry them away, and convert them to his own use, whereupon the defendants, as servants of the said Marquis, after request and refusal, took them. The plaintiff took issue on all the pleas, and also demurred to the third plea. The third plea having been held good, the case came on for trial before Mr. Justice Willes, at the summer assizes for Leicester, in 1861.

It was then proved that the plaintiff was a licensed dealer in game at Stamford; the defendants were in the service of the Marquis of Exeter. On the 16th October, 1860, the plaintiff bought of a man named Yates two bags containing about ninety rabbits, and ordered them to be conveyed to him at the Midland Station at Stamford. These rabbits had been started, chased, and killed on the land of the Marquis of Exeter by persons who were strangers to him, and who, on killing the rabbits, at once put them into bags and carried them to the railway station at Ketton. They were sent thence to Stamford, and on their arrival at the latter place, the plaintiff paid the carriage, and was about to take away the rabbits, when they were claimed by the defendants as the property of the Marquis of Exeter, and were forcibly taken from the plaintiff. In his charge to the jury, Mr. Justice Willes said that property in the land did not give a man property in animals of a wild nature upon it, after they had become old enough to escape from it. A verdict was found for the plaintiff. A rule was afterwards obtained for a new trial, on the ground of misdirection, the learned Judge having told the jury that, assuming the facts stated by the plaintiff to be proved by the evidence, there was nothing to show that the right of possession of the rabbits was in the Marquis of Exeter. This rule was made absolute; * 623 and on appeal to the Exchequer Chamber the * decision was affirmed.¹ The present appeal was then brought.

Mr. Serjeant Hayes and *Mr. Beasley*, for the appellant. — This case was decided in the Court below on the assumption that it was entirely governed by that of *Lord Lonsdale v. Rigg*.² That that case is not in point is quite clear. The sole question there was, who was the owner of the soil; the question here raised was never put forward, nor was a single authority cited on it. The action there being for trespass on the land, the killing of the grouse was merely stated as an evidence of the act of trespass; it was no more valuable as affecting the right to go on the land than if they had been sparrows. [THE LORD CHANCELLOR. — If grouse are flying in the air over my land, are they my property?] No. If while in the air they are killed by the act of another person, and taken away by him, they belong to him. Trespass might be

¹ 12 C. B. N. S. 501; 13 C. B. N. S. 844.

² 11 Exch. 654; 1 H. & N. 923.

maintained against him for being on the land, but the birds he shot by his act would be his. They were wild, and his act reduced them into possession. A notion once prevailed that wild birds were to be treated as part of the soil itself, and a bishop of London granted a lease for a term of years excepting therefrom trees, and the birds making nests in the trees; but where rights between two individuals were defined and restricted by contract, such a case can be no precedent for the present. The ordinary and well-settled opinion of all writers on law was, that occupation was the principle on which all property was founded, and Mr. Justice Willes showed how long that notion had been formally recognised, by a reference to *Justinian's Insti- * 624 tutes.¹ Precisely to the same effect is a passage in Bracton.² The doctrine was recognised by our law, with such exceptions only as the feudal law and the royal prerogative had introduced into it, as in the *Swans' Case*.³ If creatures *feræ naturæ* when shot are the property of the man on whose land they are shot, then the taking of them by a stranger would be larceny. But all the authorities show that that is not so. They are *nullius in bonis*.⁴ Nor could trover be maintained for them. It cannot be denied that wild animals are the property of no one while alive. If shot, and carried away at the moment, they become the property of the person who by shooting them reduced them into possession. [THE LORD CHANCELLOR. — Suppose a poacher shot a rabbit, and hanged it up on a tree, and there left it for hours, would it be his property? Could he come back and claim it?] There may be some difficulty on that point, which it is not necessary here to discuss.

This case was supposed to be decided by the opinion of Lord Holt in *Sutton v. Moody*,⁵ where he says, "If A. starts a hare in the grounds of B., and hunts it and kills it there, the property continues all the while in B.," but in fact that was only a mere dictum, and the principle that governed the decision of the case

¹ Lib. 2, tit. 1, § 12.

² Lib. 2, c. 1, § 2.

³ 7 Rep. 17 b.

⁴ 3 Inst. 109, 110; 2 East's Pleas of the Crown, 607; 2 Russ. on Crimes, Bk. 4, c. 10, § 11, p. 280, Greave's ed.; 1 Hale, P. C. 511.

⁵ 1 Ld. Raym. 250; 2 Salk. 556; Comyns, 34; 12 Mod. 144, 145. See S. C. 5 Mod. 375, where Justice Rokeby says, "It was in his own close, and why should any man come there?"

itself was that the property was all the time in the owner of the King's forest, and Lord Holt shows this by another illustration ; for, after saying that if A. starts a hare in the grounds of B., and chases it into the land of C., and kills it there, it is

* 625 * the property of the hunter, he goes on to say, that in exactly the same circumstances, if the land of B. was a forest or warren, the property in the hare would still continue in B. That, therefore, was a case of a peculiar privilege, and cannot affect the present, the more especially as Lord Holt, in the course of his judgment there, distinguishes it from the case of an ordinary owner of land, and he clearly recognises the title by occupation as the ground of property when he speaks of hunting out of A.'s land and killing in B.'s land, for he says, expressly, that it would be the property of the captor.¹ The case of *Churchward v. Studdy*² shows that the act of reduction into possession gives the principle on which ought to be decided the question of property. There the defendant's dogs followed into one man's land a hare which they had started on another man's land, and Lord Ellenborough said "that as the defendant's dogs had reduced the hare into his possession, that made an end of the question," and the property in the hare was held to be in the hunter whose dogs had so chased it. That was, in fact, an adoption of the law stated in Justinian as the rule of the civil law, and declared by Bracton as the law of this country. [THE LORD CHAN-

CELLOR. — What becomes of the doctrine of property in a
* 626 wild animal arising from * reducing it into possession if the man who has so reduced it may still be punished as a trespasser for doing it on another man's land ?] The two things are not inconsistent with each other, or, at all events, the liability to a proceeding for trespass on a particular spot of land cannot affect

¹ 12 Mod. 145. Lord Holt, referring to 12 H. 8, fol. 9, said, "If a man start game in his own ground, and hunt it into his neighbour's ground, and then kill it, yet in regard of his first starting and pursuit, the property is still in him ; and it may be inferred from that case, that if I start game in one man's ground, which is not my own, and hunt it into another man's ground, and there kill it, the property is in me ; because, the party on whose ground it was started having no privilege, he cannot come and take it." In 1 Ld. Raym. 250, the words are, "If A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A. the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C."

² 14 East, 249.

the general doctrine on which a right to property is founded. *Churchward v. Studdy*¹ distinctly recognises that general title to property. [THE LORD CHANCELLOR. — That case merely follows one of the three illustrations given by Lord Holt in *Sutton v. Moody*.]

*Bowlston's Case*² distinctly shows that property in conies cannot exist in any one exclusively, unless by virtue of a grant from the King. [THE LORD CHANCELLOR. — Not when they are off the land.] That shows that they are not really property; they only are so in a qualified way, in virtue of a particular privilege conferred by the Crown. To be really property they must be reclaimed, and that must be so shown in the declaration, *Mallocke v. Eastly*,³ *Fines v. Spencer*.⁴ *Pollexfen v. Crispin*⁵ does not apply here, for in that case the place where the fish were taken was alleged to be a several fishery, which it was said, must, after verdict, be taken to intend a stew pond. Of course that showed them to be completely under control, like birds in a cage. *Keeble v. Hickeringill*⁶ proceeds on the same principle, besides which wild fowl, the subject of that action, are protected as property by Statute 25 Hen. 8, c. 11. But rooks are not protected, and in *Hannam v. Mockett*⁷ they were treated as *feræ naturæ*, and so an action for shooting at and killing them was held not to be maintainable * by the owner of the trees in which they * 627 congregated.

The Game Act, which permits the stopping of a poacher and taking away the game found in his possession does not thereby show that the Legislature recognised a property in game as existing in the owner of the soil; but took it away from a man who would otherwise have been entitled to it lawfully, because his mode of acquiring it was unlawful, involving, as it did, a trespass on another man's land, and a breach of the Game Laws.

Mr. Macaulay and *Mr. Field*, for the respondents. — The case of *Lonsdale v. Rigg* was not treated as the sole authority for deciding this case, but it may be passed by entirely, and still the authorities will fully warrant the judgment of the Court below.

¹ 14 East, 249.

² Cro. Eliz. 547, 5 Rep. 105.

³ 3 Lev. 227.

⁴ 3 Dyer, 306 b.

⁵ 1 Ventr. 122.

⁶ 11 East, 574, n.

⁷ 2 B. & C. 934.

• The real question here is, to whom belong the conies killed on my land? It is no sufficient answer to that question to say that they belong to the man who killed them, because he expended his labour in killing them, and so reduced them into possession, and that he cannot be indicted for larceny, but is merely a trespasser, and therefore that I have no property in them. By what right does he come on my land without my permission, and employ his labour there, not for mine, but for his own benefit. The fact that he cannot be indicted for larceny proves nothing. The same thing would be true of his breaking a branch of a tree and carrying it away, and yet nobody doubts that the property of the tree is in me. Larceny or no larceny is, in a case of this kind, not a question of property, but of a technical form of criminal pleading.

Animals *feræ naturæ* are divided into two classes: first, * 628 * such as are vermin, or unprofitable to man; secondly, such as are known as game, and such as are profitable to man. In the first class no one has any property; in the second there is a qualified property. Even as to the first class a man cannot justify trespass on my land because he was in pursuit of vermin. *Gundry v. Feltham*¹ shows that trespass is unwarrantable even in following a fox, except under special circumstances, and *Hannam v. Mockett*² was decided on the ground that rooks were not of profitable use to man, and were not protected by statute. The latter case shows that if the animals had been of use to man as for the purpose of food, a property in them would have existed. The general right of the owner of the soil to the wild animals found on his land was admitted in *Graham v. Ewart*.³

As to those animals which are profitable, there is a property, qualified or otherwise, in them belonging to some one; and this principle of the English law is wholly unaffected by the rules of the civil law. The quotations, therefore, from Justinian and Bracton are inapplicable here, for the principle which gives the property to the first captor could only apply to places where no one has a property in the soil where the capture takes place. In a country where every bit of land is the property of some one known individual, no one by coming on the land of another, and there using his own labour, can acquire a title to take away the property of that other.

¹ 1 T. R. 334.

² 1 H. & N. 550, 7 H. L. Cas. 331.

³ 2 B. & C. 934.

In the report of *Sutton v. Moody* in Modern Reports,¹ Lord Holt says, "*Warrenna* is property *satione privilegii*, and then there is a property *ratione soli*, both which properties are local." That is strengthened by the case of * *Bowlston*,² where it was * 629 distinctly declared that no action for damages could be maintained by one whose crops were injured by conies coming from the defendant's land, for the conies might be said to be plaintiff's while they were upon his land, and he might kill them. In *Newton v. Richards*,³ "It was resolved by the whole Court, in an action of trespass, that *quare clausum fregit et cuniculos suos* * * * *cepit* was good," which was a distinct recognition of the principle that the ownership of the soil gave the ownership of the wild animal caught there. In Viner's Abridgment⁴ the same rule is recognised. Even with regard to wild animals belonging to the King, Manwood says,⁵ "If the wild beasts of the King wander out of the forest into the pourallée" (or purlieu — that is a place adjoining the forest, but disafforested), "the King had property in them still, against all but the owners of the woods and lands in which they are — they have a special property in these wild beasts *ratione soli*."

*Churchward v. Studdy*⁶ recognised the same principle, and would justify the judgment here so far as the facts are concerned, for the Court there only applied the exceptive principle, stated in the decision of Lord Holt, as to the hunter's property in the game when chased from the land of A. into the land of B., and killed in the land of B. So distinctly do the old authorities recognise the property in conies to be in the owner of the soil where they are found, that in *Hadesden v. Gryssel*⁷ it was declared that conies of the lord of a manor could not be chased by a commoner while on the common of the manor though damage *fesant*, but that if they went * off the lord's land he lost his property in * 630 them. It may be admitted, that if a wild animal is pursued out of A.'s land by a wrong doer there, and is captured or killed elsewhere, A. cannot maintain trover for the animal. That is a technical distinction of pleading, but it strengthens the argument for the respondents, and reconciles all the authorities from the

¹ 12 Mod. 144.² Cro. Eliz. 547, 5 Rep. 105.³ Godb. 174.⁴ Tit. Property, (B.) pl. 5.⁵ Ch. 20, § 4.⁶ 14 East, 249.⁷ Cro. Jac. 195.

time of Henry VIII. to *Lonsdale v. Rigg*. The property in the wild animal is stated by Mr. Christian,¹ as the result of all the authorities, to be in the owner of the land where the animal is found. If so, and if while the wild animal is alive it is the property of A., the owner of the land where it lives, the killing of it cannot defeat that property, and make the dead creature the property of another person. The mere giving of a death wound, and that against the will of the owner of the soil, who, in virtue of such ownership was the owner of the wild animal, cannot have the effect of changing all the relations of property.

Mr. Serjeant Hayes, in reply. — It cannot be doubted that these creatures are not the subject of larceny. The 7 & 8 Geo. 4, c. 29, § 30, made the taking of them punishable criminally, but that was not on the ground of property in them, but as part of the legislation against acts of poaching. The case of *Newton v. Richards*² was a mere question of pleading, and the report does not show whether the conies in the plaintiff's close were or were not in an enclosure, or had not been domesticated. The action too was for trespass to the land, not for the value of the conies; and the taking of them was mentioned merely as an act of trespass.
* 631 pass. Here the conies were not on the land when they were taken from the plaintiff; they were in the actual possession of the plaintiff at the railway station, and were forcibly taken from him.

June 13.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, when it is said by writers on the Common Law of England that there is a qualified or special right of property in game, that is in animals *feræ naturæ* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill, and appropriate such animals which is sometimes called by the law a reduction of them into possession.

This right is said in law to exist *ratione soli*, or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely *propter industriam* and *ratione impotentiae*, for these grounds apply to animals which are not in the proper sense *feræ naturæ*. Property *ratione soli* is the common law

¹ The Game Laws, ch. 3, p. 49 (ed. of 1817).

² Godb. 174.

right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown in virtue of its prerogative, one man had of killing and taking animals *feræ naturæ* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, became the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.

The question in the present case is whether game * found, * 632 killed, and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by myself, or my servant by my authority.

Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrong doer, should divest the owner of the soil of his qualified property in the game, and give the wrong doer an absolute right of property to the exclusion of the rightful owner.

But in game, when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A., must vest either in A. or the trespasser, and if it be unreasonable to hold that the property vests in the trespasser or wrong doer, it must of necessity be vested in A., the owner of the soil.

This view of the case is supported by a series of decisions. In the case of *Sutton v. Moody*¹ Lord Chief Justice Holt deduced several conclusions from the Year Books on the subject of property in game. Among these are the following propositions: "If A. starts a hare in the grounds of B., and hunts it and kills it there, the property continues all the while in B."

In the case thus put it must of course be taken that A. has hunted and killed the hare without the leave or license of B., and therefore that it is a wrongful act by A. which enures for the benefit of the true owner, viz. B. the owner of the soil.

Another proposition is, that if A. starts game in the forest

¹ 1 Ld. Raym. 250.

* 633 or warren of B. and hunts it into the grounds of * C. and there kills it, the property is in B. the proprietor of the chase or warren, because the privilege continues, and consequently B. is entitled to the absolute property in the dead game so chased and killed by A., who from the statement of the case must be taken to have acted without the license of B., and therefore to have been a trespasser.

A third proposition is, that if A. starts a hare in the ground of B. (who is entitled *ratione soli* only, for that is plainly implied), and hunts it into the ground of C., and there kills it, the property is in the hunter; for it cannot be in B., who is entitled *ratione soli* only, and not *ratione privilegii*, for the hare is not killed upon his land; and it cannot be in C., for the game was not originally found in his possession, but was only driven upon his ground by the chase and pursuit of the hunter.

These propositions appear to me to prove clearly that game found killed by a trespasser under such circumstances as that it would be the absolute property of the owner of the soil, or of the owner of the right of free warren, if it had been found and killed by such owner, instead of by the trespasser, does in law become the absolute property of the proprietor of the soil or privilege, immediately on its being so caught and killed by the trespasser.

The law, so laid down in *Sutton v. Moody*, is consistent with several earlier cases decided subsequently to the Year Books, of which I will mention one, *Coney's Case*,¹ which has been recognised and acted upon in several subsequent decisions. Of these I may mention *Churchward v. Studdy*,² *Graham v. Ewart*,³ and lastly, * 634 the * *Earl of Lonsdale v. Rigg*,⁴ in the Courts of Exchequer and Exchequer Chamber, on which so much reliance was placed by the Courts of Common Pleas and Exchequer Chamber,⁵ in their decision of the present case.

With respect to this case of *Lonsdale v. Rigg*, I entirely concur in the observations of Mr. Justice Blackburn, and consider that case as a conclusive authority upon the point before us, which it is not desirable to question or disturb.

The case, when properly considered, amounts to this: grouse

¹ Godb. 122.

² 14 East, 249.

³ 11 Exch. 326, 1 H. & N. 550. See 7 H. L. Cas. 331.

⁴ 11 Exch. 654, 1 H. & N. 923.

⁵ 12 C. B. N. S. 501, 13 C. B. N. S. 844.

were shot and taken away by a trespasser upon and from the land of the plaintiff, who brought trover for the dead grouse, and it was clearly held by the Judges of the Court of Exchequer, and afterwards by all the Judges in the Court of Error, that the grouse as soon as they were killed and fell upon the land of the plaintiff, became and were his absolute property in respect of his ownership of the soil.

This conclusion would not be affected even though it might be true that an indictment at common law would not lie against the trespasser for killing and carrying away of game, if it be one continuous act, inasmuch as the ownership of the game is considered as incident to the property in the land. But this consequence is the result of a peculiarity in the law of larceny, which holds that the act of severing and taking away things attached to the freehold is not a felonious taking, a result which does not affect the existence of the right of property.

I am therefore of opinion that the learned counsel for the defendants on the trial at Nisi Prius were right in requiring the evidence to be admitted which they proposed to give in order to prove that the property in the rabbits was *in Lord *685 Exeter, and that the learned Judge was wrong in his direction to the jury that such evidence was immaterial.

I am therefore of opinion, that the order making the rule nisi for a new trial absolute was right, and that the present appeal ought to be dismissed with costs.

✓ LORD CRANWORTH. — My Lords, I think it is safe and just to adhere to the law as laid down by Lord Holt. He had evidently considered the subject carefully, and according to his view of the law the rabbits killed by a trespasser on the lands of Lord Exeter certainly belonged to his Lordship.

Lord Holt's opinion was followed in *Churchward v. Studdy*.¹ There the hunter (who was a poacher) was eventually held to be entitled to the hare, but that was because he had started it on the land of a third person, and followed it on to the ground of the defendant and there caught and killed it. It was in strict conformity with Lord Holt's view of the law to hold that, in these circumstances, the hare belonged to the hunter. The rule nisi was granted by the Court of King's Bench on the supposition that the

¹ 14 East, 249.

hare had been caught on the land of the defendant by his servant, acting as his agent, in which case the Court clearly thought it would have been the property of the defendant, whereas in fact the defendant's servant was assisting the hunter and his dogs.

This case was followed by that of *Lord Lonsdale v. Rigg*,¹ afterwards affirmed in the Exchequer Chamber,² where the subject was carefully considered. It was there decided that grouse

* 686 killed by a poacher belong to the * owner of the soil on which they are killed, strictly applying Lord Holt's doctrine. There was not a formal plea in that case traversing the property in the birds; but it was agreed to waive that objection in point of form, and to dispose of the case as if such an issue had been expressly raised.

It was argued before the House that if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But that is a fallacy. Wild animals whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, as growing fruit was, considered as part of the realty. If a man entered my orchard, and filled a wheelbarrow with apples, which he gathered from my trees he was not guilty of larceny,³ though he had certainly possessed himself of my property; and the same principle is applicable to wild animals.

It was further said that the late Game Act, which authorises the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the parish, shows that the Legislature could not have understood the game to be the property of the person on whose land it was killed, for in that case it was said it would have been an unjust appropriation of the property of another; but this provision in the statute was probably made because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be on the whole an arrangement beneficial to the landowner.

On the whole I see no reason for disturbing the decision
* 687 * of the Court below, and I think that there ought to be a new trial.

¹ 11 Exch. 654.

² See now the Statute 24 & 25 Vict. c. 96, § 36.

³ 1 H. & N. 923.

LORD CHELMSFORD. — My Lords, the question to be determined on this appeal is, whether animals *feræ naturæ*, killed or reduced into possession by a trespasser on the land of another, become the property of the owner of the land.

The case was very learnedly argued on both sides, and all the authorities with respect to property in wild animals, either in a state of nature or reclaimed, were fully examined, and both the civil and the common law were referred to for doctrine on the subject.

By the civil law, the person who took or reduced into possession any animal *feræ naturæ*, although he might be a trespasser in so doing, acquired the property in it. This appears clearly from the passage in the Institutes cited in the argument. If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon his Lordship's land.

This doctrine, however, as to the right of property in wild animals captured, seems never to have prevailed in our law to its full extent. With respect only to live animals in a wild and unreclaimed state, there seems to be no difference between the Roman and the common law.

A distinction was suggested in argument between wild animals which are unprofitable, and regarded as vermin, and those which are fit for food, and therefore profitable; and it was said of the latter that by the law of England there is always a property in game, whether alive or dead, in somebody.

But this is not reconcilable with the authorities. In *the *688 case of Swans,¹ Lord Coke says, "A man hath not absolute property in any thing which is *feræ naturæ*.**** Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain by two ways, by industry, or *ratione impotentie et loci*." "But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c. he hath not any property in the deer or conies, or pheasants or partridges, and therefore in an action *quare parcum, warrennum, &c., fregit et intravit, et tres damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say *suos*, for he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure, so long as they remain in the privileged place"; a for-

¹ 7 Rep. 15 b.

tiori, therefore where a person is merely the owner of land without any other privilege attached to it than that which the ownership confers, he can have no property in the wild animals upon the land, so long as they are in a state of nature and unreclaimed. Indeed this notion of the existence of property in wild animals is inconsistent with the whole current of the authorities, from the Year Books downwards, which almost invariably show that no action lies merely for taking away hares, conies, pheasants, and partridges, and that where the taking animals of this description is stated in the writ, in addition to the trespass upon the land, the plaintiff shall not say, "*lepores, &c. suos.*"

With respect to wild and unreclaimed animals therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed, or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, * 639 absolutely * when they are killed, and in a qualified manner when they are reclaimed.

So far everything is clear, and the only difficulty which arises upon the subject of property in wild animals, is that which the present case presents.

As animals *feræ naturæ* when killed or reduced into possession by the owner of land where they are found, or by his authority, become instantly his property, does the unauthorised act of a trespasser, by the very fact of killing them, convert them at once to the use of the owner of the land?

To this question Lord Holt, according to the case which he puts in *Sutton v. Moody*, would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him.

I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather perhaps a right to take it, existing in the owner of the land, which was sufficient to make it his the instant, by being killed or taken, it became the subject of property. But I cannot so easily discover the principle upon which he proceeds when he said that "If A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A. the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C."

I have some difficulty in understanding why the wrong doer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have been his property. * Why then should not the act of a tres- * 640 passer to which C. was no party, have the same effect as to his right to the animal, as if it had voluntarily quitted the neighbouring land? And why, not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle, to hold that if the trespasser deprived the owner of the land where the game was started, of his right to claim the property by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner and not for himself.

But the first proposition stated by Lord Holt, with respect to game started and killed on the land of the same owner, is free from all difficulty, and is sufficient to dispose of the present question. The case of *Sutton v. Moody* has always been regarded as an authority upon this point, and as far as I can ascertain, has never been questioned. It was recognised in *Churchward v. Studdy*,¹ in *Graham v. Ewart*,² by Baron Martin in *Lord Lonsdale v. Rigg*; ³ and in this last case, when before the Court of Error,⁴ Mr. Justice Coleridge said, "The grouse shot" (i. e. shot by the defendant a wrong doer) "on the land of the plaintiff belonged to him according to all the authorities."

It certainly would not be right to disturb a principle of law so long established, unless it could be clearly shown to be erroneous. And it appears to me not only to be well founded, but that very strange consequences would follow from adopting the view contended for by the appellant. * If he is right in saying * 641 that the owner of the land has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby, as possessor, though a wrong doer, having a right to it against all the world, there being no one entitled as owner to challenge

¹ 14 East, 249.² 11 Exch. 654.³ 11 Exch. 326, 1 H. & N. 550, 7 H. L. Cas. 331.⁴ 1 H. & N. 923, 937.

his possession, might maintain an action against the owner of the land for taking the game from him even upon the land itself where it was killed. It is much more reasonable to hold that the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed.

This view of the case will render the distinction suggested in the course of the argument between killing and carrying away the rabbits as parts of one and the same continuous act, and killing them and leaving them upon the land and coming back for them, wholly immaterial. For the act of killing being at once that which made the rabbits the subject of property, and reduced them into possession, whether they were for an instant or for hours upon the land, they equally belonged to the owner of the land.

For these reasons I think that the judgment of the Court of Exchequer Chamber affirming the judgment of the Court of Common Pleas was right, and ought to be affirmed.

Judgment affirmed, and appeal dismissed with costs.

Lords' Journals, 13th June, 1865.

1865. June 30; July 5.

THE DIRECTORS, &C. OF THE ST. HELEN'S SMELTING COMPANY,
Appellants.

WILLIAM TIPPING, *Respondent*.¹

Nuisance to Property. Direction to Jury.

There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of

¹ Rylands v. Fletcher, Law Rep. 3 H. L. 337.

the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him; as to the former the same rule would not apply.

Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages, in respect of injury created by it to property in the neighbourhood.

A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not within the meaning of the law, "a convenient" place.

A. bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works when they were in operation were proved to be injurious to the trees on A.'s estate. At the trial the Judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbour; but that the law did not regard trifling inconveniences; every thing must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapours from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property; that locality, and all other circumstances must be taken into consideration, and that in counties where great works have been and were carried on, parties must not stand on extreme rights:—

Held, That the direction was right.

THIS was an action brought by the plaintiff to recover from the defendants damages for injuries done to his trees and crops, by their works. The defendants are * the directors and * 643 shareholders of the St. Helen's Copper Smelting Company (Limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor house and about 1300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that, "the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling house and lands of the plaintiff, and caused large quantities of noxious gases, vapours, and other noxious matter, to issue from the said works, and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage, were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed, and also the reversionary lands and

premises were depreciated in value." The defendants pleaded, not guilty.

The cause was tried before Mr. Justice Mellor at Liverpool in August, 1863, when the plaintiff was examined and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapour, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross examination, he said he had seen the defendants' chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was called to show that the whole neighbourhood was studded with manufactories and tall chimneys, that there were some alkali works close by the defendant's works, that the smoke from one was quite as injurious as the smoke from the other, that the smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was

*644 *attributable. The fact that the defendants' works existed before the plaintiff bought the property was also relied on.

The learned Judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbours; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendants' counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The

learned Judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative. Whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business, and conducted * in a proper manner, * 645 in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff, and the damages were assessed at 361*l.* 18*s.* 4½*d.* A motion was made for a new trial, on the ground of misdirection, but the rule was refused.¹ Leave was however given to appeal, and the case was carried to the Exchequer Chamber, where the judgment was affirmed. Lord Chief Baron Pollock there observing, "My opinion has not always been that which it is now. Acting upon what has been decided in this Court, my brother Mellor's direction is not open to a bill of exception."² This appeal was then brought.

The Judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee, attended.

The Attorney-General (Sir R. Palmer) and Mr. Webster, for the appellants (defendants in the Court below). — The law on this subject is doubtful, and requires to be settled by the authority of this House. A dictum of Lord Chief Baron Comyns³ declared that an action on the case will not lie "for a reasonable use of my right, though it be to the annoyance of another; as if a butcher, brewer, &c. use his trade in a convenient place, though it be to the annoyance of his neighbour." That dictum, for which it is admitted no authority is cited, nevertheless lays down the true principle. That principle was adopted in *Hole v. Barlow*.⁴ It was not * distinctly dissented from in *Stockport* * 646 *Waterworks Company v. Potter*.⁵ It was adopted in *Bamford v. Turnley* in the Court of Queen's Bench,⁶ but when that case was heard in the Exchequer Chamber,⁷ *Hole v. Barlow* was

¹ 4 Best & S. 608.

⁶ 7 H. & N. 160.

² 4 Best & S. 616.

³ 3 Best & S. 62.

⁵ Com. Dig. Action on the Case for Nuisance (C).

⁷ 3 Best & S. 66.

⁴ 4 C. B. N. S. 334.

expressly dissented from by several of the Judges. Their dissent is not warranted by principle or authority. Our material question is the convenience or fitness of the place where the business is carried on.

In *Bamford v. Turnley*,¹ it is said by Mr. Justice Williams, "It was therefore treated as a doctrine of law that if the spot should be proved by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action," and he then proceeds to argue that they would not do so if the work was carried elsewhere, or if it actually created a nuisance to a neighbour. But a part of the fallacy of the argument lies in this mode of stating the case. An act may be an annoyance without being a nuisance. If only an annoyance, then being performed in a convenient place, for the proper phrase is "convenient," and not "suitable," and performed, as here it was expressly found to be, in a careful way, in "the best manner," it is no nuisance.

And in that case itself Mr. Baron Bramwell really has adopted these principles, for he says,² "It is to be borne in mind however, that, in fact, the act of the defendant is a nuisance." Now, that shows that even in his opinion the doctrine of nuisance would not be applicable except under a certain condition of fact; and it is clear from the verdict in this case that that condition of fact did not exist. In *Cavey v. Leadbitter*,³ Lord Chief Justice * 647 * Erle distinctly states that he did not differ from the judgment of Mr. Justice Willes in *Hole v. Barlow*. Now in that case Mr. Justice Willes said,⁴ "The common-law right which every proprietor of a dwelling-house has to have the air unpolluted is subject to this qualification, that necessities may arise for an interference with that right *pro bono publico*, to this extent, that such interference be in respect of a matter essential to the business of life, and be conducted in a reasonable and proper manner, and in a reasonable and proper place." The nature of the thing, the place where it is used, and the fair and proper use of it, are all circumstances to be considered before a thing can be pronounced a nuisance. When, therefore, by the use of certain manufactures, a neighbourhood is, as it may be said, denaturalized, a person who comes into that neighbourhood cannot complain that what was

¹ 3 Best & S. 74.

¹ 13 C. B. N. S. 470.

² 3 Best & S. 82.

⁴ 4 C. B. N. S. 334.

done before he came there is continued. Under such circumstances the ordinary use of property is really that of its use in the special manner, and such use cannot give rise to a right of action by a person who happens to suffer some annoyance from it; what is done around him assumes then the character of the ordinary and proper use of the property. In *The Wanstead Local Board of Health v. Hill*,¹ it was decided that under the words of a particular statute (11 & 12 Vict. c. 63), brickmaking was not a "noxious or offensive business," but that case is chiefly remarkable for the declaration of Mr. Justice Willes as to the unsettled state of the law on this matter. That learned Judge says, "It is still, I apprehend, an open question which must one day be determined by the highest tribunal, whether one who carries on a business under reasonable circumstances of place, time, and otherwise, can be said to be guilty of an actionable nuisance."

The old authorities show that ordinary trade reasonably * carried on is not a nuisance. In *Jones v. Powell*,² the * 648 mere facts of the erection of a brewhouse, and of an ordinary use of sea coal, were not held to constitute a nuisance, but the erection of a latrina from which "unhealthy vapours arose," was, after verdict, held to warrant the action. In *Baines v. Baker*,³ Lord Hardwicke refused to grant an injunction to prevent the building of a small-pox hospital near Cold Bath Fields, laying down the principle that in all cases the Court must consider not merely the effect on the neighbouring property, but also the reasonableness of doing the thing in the particular place. The statement to the jury here that the business was actionable if it interfered with the comfort of the plaintiff was therefore a misdirection. That alone would not render it actionable; nor would the fact that it produced injury to the plaintiff's trees and shrubs have that effect. It cannot be asserted as an abstract proposition of law that any act by which a man sends over his neighbour's land that which is noxious and hurtful is actionable, but the jury must be told to take into account the condition of the other property in the neighbourhood, the nature of the locality, and the other circumstances which show the reasonable employment of the property, and even the employment of it in a particular manner in that particular locality. To ask the jury merely whether there

¹ 13 C. B. N. S. 479.² Palm. 536.³ Amb. 158.

has been a sensible injury to the plaintiff's property, or to his enjoyment of it, is not sufficient.

Mr. Brett, Mr. Mellish, and Mr. Milward were for the respondents, but were not called upon to address the House.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, as your Lordships, as well as myself, have listened carefully * 649 to the able argument on the part of the * appellants, and are perfectly satisfied with the decision of the Court below, and are of opinion that, subject to what we may hear from the learned Judges, the direction to the jury was right, I would submit that two questions should be put to the learned Judges ; but at the same time the learned Judges will be good enough to understand that if they desire further argument of the case the respondent's counsel must be heard. Otherwise the following are the questions which I propose to be put to them : Whether directions given by the learned Judge at Nisi Prius to the jury were correct ? or, Whether a new trial ought to be granted in this case ? The learned Judges will intimate to your Lordships whether they desire to hear further argument on the part of the respondent's counsel, or whether they are prepared to answer the questions put to them by your Lordships.

MR. BARON MARTIN said that the Judges did not require the case to be further argued, but they requested to have a few moments' consideration to give their answer to the questions put to them.

Adjourned for a short time, and resumed.

MR. BARON MARTIN. — My Lords, in answer to the questions proposed by your Lordships to the Judges, I have to state their unanimous opinion that the directions given by the learned Judge to the jury were correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

July 5.

THE LORD CHANCELLOR. — My Lords, I think your Lordships will be satisfied with the answer we have received from the learned Judges to the questions put by this House.

* My Lords, in matters of this description it appears to * 650 me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, any thing that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances * the immediate result of which is sensible injury to the * 651 value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of the present appellants, in their works at St. Helen's.

Of the effect of the vapours exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My Lords, the action has been brought upon that, and the jurors have found the existence of the injury ; and the only ground upon which your Lordships are asked to set aside that verdict, and to direct a new trial, is this, that the whole neighbourhood where these copper-smelting works were carried on, is a neighbourhood more or less devoted to manufacturing purposes of a similar kind, and therefore it is said, that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My Lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury *652 and destruction to the neighbouring *property. Of course, my Lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgment of the learned Judges in the Court below), I advise your Lordships to affirm the decision of the Court below, and to refuse the new trial, and to dismiss the appeal with costs.

LORD CRANWORTH. — My Lords, I entirely concur in opinion with my noble and learned friend on the Woolsack, and also in the opinion expressed by the learned Judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years ; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor. He says, "It must be plain, that persons using a limekiln, or other works which emit noxious vapours, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law,

a convenient place." I always understood that to be so ; but in truth, as was observed in one of the cases by the learned Judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honour of * being one of the Barons of the Court of Exchequer, trying * 653 a case in the county of Durham, where there was an action for injury arising from smoke, in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person ; but I said, " You must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields " ; because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractedly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE. — My Lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think every thing is included : The defendants say, " If you do not mind you will stop the progress of works of this description." I agree that it is so, because, no doubt, in the county of Lancaster above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, " I will bring an action against you for this and that, and so on." Business could not go on if that were so. Every thing must be looked at from a reasonable point of view ; therefore the law does not regard trifling and small inconveniences, but only regards * sensible inconveniences, in * 654 juries which sensibly diminish the comfort, enjoyment or value of the property which is affected.

My Lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench affirmed; and appeal dismissed with costs.

Lords' Journals, 5th July, 1865.

HARWOOD v. GREAT NORTHERN RAILWAY CO.

1864. June 30; July 14. 1865. February 20; July 6.

HAMILTON E. HARWOOD and another Executor of
C. HEARD WILD, Deceased, *Appellants.*
The DIRECTORS, &C. OF THE GREAT NORTHERN RAIL-
WAY COMPANY, *Respondents.*¹

Patent. Novelty.

Where there are two things similar in form, used for a similar object, and capable of the same application, one of them having been long known to mechanics, the introduction of the other into use will not constitute a good ground for a patent.

A slight difference in the mode of application is not sufficient for such a purpose; nor will it be sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied.

The use of "fishes" as supports was known, and the use of "fishes" made with a groove or recess in their outer surface, was also known. A person took out a patent, which he thus described: "My invention consists in forming a recess or groove in one or both sides of each fish, so as to reduce the quantity of metal at that part; and to be adapted to receive the square heads of the bolts, which are thus prevented from turning round when the nuts are screwed on." His claim was "for constructing fishes for connecting the rails of railways,
* 655 with a groove adapted for receiving the ends of * the bolts or rivets employed for securing such fishes; and the application of such fishes for connecting the ends of railways in manner hereinbefore described. The constructing of fish joints for connecting the rails of railways with grooved fishes fitted to the sides of the rails, and secured to them by bolts or nuts, or rivets, and having projecting wings firmly secured to and resting upon the sleepers or

¹ *Simpson v. Holliday*, Law Rep. 1 H. L. 318.

bearers, so as to support the rails by their sides and upper flanges." It was proved that before the date of his patent, fish-joints had been used to connect and strengthen the rails of railways. In some cases the fishes were flat pieces of iron, with round holes for bolts, the heads of the bolts being held in their places by separate means. In others the extreme ends of the holes were made square and the bolt-heads square, to put into them, and, in some, square recesses were made in the flat pieces of iron for the same purpose; but, till the time of the patent, fishes for connecting the rails of railways had never been made with a groove in their lateral surfaces so as to receive the square heads of the bolts, and render the fish lighter for equal strength, or stronger for an equal weight of metal:—

Held, that the patentee had merely transferred a known thing from one use to another, and an analogous use, and that what he claimed as his invention was not a good ground to sustain a patent.

THIS was an appeal under the Common Law Procedure Act, 1854, against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench.

The facts, as proved or admitted, were these. The appellants were the executors of Charles Heard Wild, deceased. In 1853, Wild took out a patent for an invention "For improvements in fishes and fish joints,¹ * for connecting the rails of rail- * 656 ways." The material parts of his specifications were these: "The fishes are made with a groove or recess in their outer sur-

¹ The origin of the words "fish" and "fishing," as applied to this sort of mechanical contrivance, was hastily assumed to be found in a corruption of the French word "affiche." The English sailors who used the word (for the French sailors did not) had no idea of such a derivation. The French word "affiche" simply means a thing fastened to, not supported by, another. The latter, not the former, is the purpose of the contrivance; which is the practice of sailors splicing a broken mast by two supports, one on each side. The French word for these supports has reference to the circumstances of their being two in number, and their being alike in form; that word is "jumelles," twins. The Italian word is "lapazze." The probability is that the English word "fish" was derived from the form of the things used. Originally they were two pieces of wood narrowed and bevelled off at each end. They were fastened by a cord, with all the rounds of the cord twisted close, the twists beginning on the mast at a little distance from one end of the fish, and terminating on the mast at a little distance beyond the other end. The cord could not have been kept close in all its turns from the beginning to the end except by this narrowing and bevelling. The fish were slightly hollowed to sit close to the broken mast, and rounded on the outside. They would thus resemble a fish divided down the middle, and received the name from the supposed resemblance. It was the use of the thing and its appearance, and not an imitation of language, that gave the name with its peculiar meaning.

faces, which groove serves to receive the square heads of the bolts, and prevent them turning round when the nuts are screwed on or off. Washers are placed in the groove of the fish which is next to the nuts, so as to allow of the nuts being turned round; or the fish on this side may be made without the groove. The position of the bolts and nuts may be reversed if preferred, so that the nut may be prevented from turning round while the bolt is screwed into it. The groove renders the fish lighter for an equal strength, or stronger for an equal weight of metal, than a fish which is made of an equal thickness throughout. The top and bottom of each fish is a plane surface, and the parts of the rail with which they come in contact are also plane surfaces, forming the same angle as the top and bottom surfaces of the fish. The fishes are thus made

to fit into their places with greater facility than if these surfaces were of curved or irregular forms. If, however, the surfaces of the rails are curved, the fishes may be made to fit them." He then described the thickness of the heads of the bolts, or nuts, or rivets, and said the effect of their being in grooves was to make them "project less, with the same thickness of head, than when plain ungrooved fishes are employed. This is a matter of great advantage, as avoiding the danger of the flanges of the wheels of the carriages coming into collision with the rivets." The declaration alleged in the usual form an infringement of Wild's invention by the defendants. The defendants pleaded, first, not guilty; secondly, that Wild was not the first inventor of the supposed invention; thirdly, that Wild did not file a proper specification; and fourthly, that the invention was not "new as to the public use and exercise thereof; but had been and was wholly and in part publicly and generally practised and used, &c."; fifthly, that the letters patent were not for the working or making of any new manufacture within the statute. The plaintiffs took issue on all these pleas. The cause was tried in Middlesex before Lord Chief Justice Cockburn, at the sittings after Michaelmas Term, 1859.

The objections of the defendants were to the validity of the patent, on the ground of want of novelty and of the insufficiency of the specification. If the patent could be sustained, it was admitted that the invention was useful, and that it had been infringed. It was proved that before the date of the patent, the rails of railways had been connected by fishes and fish joints, attached to each

side of the rails at the joints by means of bolts and nuts. In some cases flat fishes had been used. These were of different kinds; but until the time of Wild's patent, fishes for connecting the rails of railways had never been made with a groove or recess in their outer * or lateral surfaces, so as to receive the square * 658 heads of the bolts, and at the same time, in the words of the specification, to "render the fish lighter for an equal strength, or stronger for an equal weight of metal, than a fish made of equal thickness throughout." But it was also proved that before the date of the patent, and under the superintendence of the late Mr. Brunel, in the construction of bridges, beams of timber had been laid horizontally, one above the other, and fastened or bolted together with bolts and nuts; that horizontal bars or plates of iron were placed beneath, and parallel to, and in contact with, the horizontal beams, and were also fastened or bolted by the same bolts and nuts, and that each of these bars or plates of iron was constructed with a groove in its under surface, which received the square or horizontal heads of the bolts. This was done for the purpose of strength, and also to prevent the heads of the bolts from turning. But in these bridges there were not joints to be fished by the bars or plates of iron, nor were there corresponding bars or plates of iron above the horizontal beams; and it was therefore insisted that there was no fishing in the proper sense of the word. The Lord Chief Justice ruled that notwithstanding this evidence, the invention was or might be the subject of a patent, but on this point he reserved leave for the defendants to move to enter a verdict for them.

It was further proved by the defendants, that in 1847 Mr. Brunel had constructed a timber bridge, known as the "Hackney Bridge," for carrying the South Devon Railway over the Teign Canal. The span of this bridge was too great to be conveniently crossed by any single beam, and the bridge was constructed so as to have, upon each side, two horizontal longitudinal beams of timber, the ends of which met, and were joined together in the * middle of the bridge by scarf joints. Beneath these * 659 beams were placed transverse planks, which extended from side to side of the bridge, and constituted its flooring or roadway, and immediately beneath the ends of the planks were longitudinal bars of grooved iron, one upon each side of the bridge running parallel to, and under the longitudinal beams along the whole

length of the bridge, with the grooves or channels downwards. Bolts with square heads passed through the grooved iron bars, transverse planking, and longitudinal beams, from the lower to the upper end of the bridge, the square heads of the bolts resting in the grooves of the iron bars, and being prevented from turning round within the grooves, and the nuts were screwed on to the upper end of the bolts.

In answers to questions specially put by the Lord Chief Justice, the jury found "that the channel irons upon the railway bridges (independently of the particular instance of the 'Hackney Bridge') were used before the patent, for the double purpose of obtaining increased strength and preventing the bolt heads from turning round, but they were not used for the purpose of fishing. Secondly, that the fastening of the scarf joint of the longitudinal beam at the Hackney bridge was a fishing of that joint, but that the use of the channel iron as one of the plates of the fish arose from its being already there for the purpose of fastening the beam and this iron together, and was not adopted by Mr. Brunel with reference to, or in contemplation of, the special advantages in fishing contemplated by Wild's patent." On these findings, the verdict was directed to be entered for the plaintiffs with leave reserved to move.

A rule was obtained to have a verdict entered for the defendants pursuant to leave, or for a new trial on the * ground of misdirection with respect to the use of the grooved iron in Hackney bridge.

This rule was afterwards discharged.¹ On appeal to the Exchequer Chamber that decision was reversed; and it was ordered that the verdict be entered for the defendants, upon the pleas denying that the invention was new, and that it was the subject matter of a patent.² This appeal was then brought.

The Judges were summoned, and Mr. Justice Williams, Mr. Baron Channell, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee attended.

Mr. Grove and *Mr. Hindmarch* (*Mr. Webster* was with them), for the appellants. — If a certain thing is known, but by a modification of it the thing can be applied to a new and useful purpose, the modification is an invention, and is good ground for a patent. That principle applies here. It may possibly be that the supports

¹ 2 Best & S. 194.

² 2 Best & S. 222, 231.

to a bridge, and to the Hackney bridge in particular, involved the same original idea of external support as that of Wild's patent, but his modification of that original idea had alone rendered it advantageously applicable for the purpose of fishing rails for railways. The idea of applying it to railways had certainly not been taken from the Hackney bridge supports. That bridge was an instance of vertical pressure. In the railway the principle was that of vertical support; the two things were essentially different, and though the bridge was built in 1847, no attempt so to apply iron to fish rails had been adopted till Wild patented his invention in 1853. The use of the fastenings to the joints in the bridge, suggested

* nothing as to increased strength with diminished weight * 661 of material. *Losh v. Hague*,¹ *Brunton v. Hawkes*,² *Brook v. Astor*,³ *Horton v. Mabon*,⁴ *The Bottle Envelope Company v. Seymer*,⁵ *Hill v. Thompson*,⁶ where there was no modification of the original idea, but only a fresh use of it, are therefore inapplicable here. But in *Muntz v. Foster*,⁷ it was distinctly held that a new application of a property of a known substance to a new and useful purpose may be the subject of a patent, and the same principle was applied in *Newton v. Vaucher*,⁸ where a different application of soft metal as a preventative of heat from friction, was held to be good ground for a patent. *Crane v. Price*⁹ affirms this principle, and also shows that it is no objection to the validity of a patent, that the invention cannot be used except by means of a former patented invention, if the former invention is expressly disclaimed by the new patentee. *Smith v. The London and Northwestern Railway Company*¹⁰ illustrates the same principle, and so does *Russell v. Cowley*.¹¹ These cases are strong instances to show that where the application of something new is engrafted on a former and even a patented process, that which was new was allowed to form a good ground for a patent. In *Crane v. Price*, the earlier invention was the use of the hot air blast, and the later invention was the use of it with anthracite coal, which material, not before then used for the same purpose * and in the same man- * 662

¹ 1 Webst. Pat. Cas. 202; Hindm. Pat. 95.

² 4 B. & Ald. 541.

³ 8 Ellis & B. 478.

⁴ 12 C. B. N. S. 437.

⁵ 5 C. B. N. S. 164.

⁶ Holt, N. P. 636, 8 Taunt. 375, 3 Mer. 622, 1 Webst. Pat. Cas. 229.

⁷ 2 Webst. Pat. Cas. 96, 103.

⁸ 6 Exch. 859.

⁹ 4 M. & G. 580.

¹⁰ 2 Ellis & B. 69.

¹¹ 1 Crompt. M. & R. 864.

ner, produced a new result in the manufacture of iron. It would have been of no service without being used in combination with the hot air blast, the use of which was the subject of the former patent. The use of the hot air blast was old, and was patented; the use of the anthracite coal was old; these two things taken separately were disclaimed, but the combination of them was new, and the patentee claimed "the application of anthracite coal combined with the using of the hot air blast," and his patent founded on such claim was held to be good.

In *Steiner v. Heald*,¹ a known process applied to fresh madder, was, by the plaintiff, applied to spent madder, which had before been thrown away, but which he thereby rendered valuable, and it was held that though the properties of fresh and spent madder might be the same, or might be different, it did not follow, as matter of law, that the plaintiff's patent was void, but that it was a question of fact for the jury whether the plaintiff's invention produced a new manufacture. In *Booth v. Kennard*,² a patent was sustained for obtaining gas from seeds, though the process of obtaining gas from the oil pressed from such seeds had been previously well known. The saving of one process, namely, the pressing of the seeds to obtain this oil, was a new and useful invention. The discovery here is that of a new modification of a form of matter to a new purpose, and consequently the patent is good.

Then as to the second point. Hackney bridge did not furnish an example of what the plaintiff's discovery has effected, and amount to a publication of that discovery to the world. The finding here negatives the purpose as * being the same. The two things are different in their application. The public were never put in possession of the means there employed to strengthen the scarf joints of the timbers, so that if the two things had been the same, there was no such publication as would affect the plaintiff's patent. To prevent a patent, there must be a use with knowledge; use in ignorance is not sufficient; *Minter v. Mower*,³ *Jones v. Pearce*.⁴ There a wheel had been used for two years, and then appeared to have been abandoned on account of a defect in its construction. The plaintiff afterwards remedied this defect, and took out a patent, and Mr. Justice Patteson⁵ told the jury that

¹ 6 Exch. 607.

⁴ Godson Pat. 46.

² 1 H. & N. 527.

⁵ 1 Webst. Pat. Cas. 122.

³ 6 A. & E. 735.

if the patentee had remedied the defect in the original, and produced a wheel which was useful and new, there was no reason to say that his patent was not good. *Muntz v. Foster*,¹ and *Hancock v. Sommerville*,² are to the same effect; and in the last-named case, Mr. Justice Williams observed that the materials of the invention were before the public, but the invention itself was not there. These cases show that to destroy a patent by a previous use, the public must have fair possession of the invention. That had not been the case here.

The House need not send the case to a new trial, and ought not to do so unless it is seen clearly that the result would be altered, *Crease v. Barrett*,³ but may examine the two things to determine whether the patent is valid, *Bush v. Fox*,⁴ *Seed v. Higgins*.⁵

* *Mr. C. Pollock* and *Mr. Horace Lloyd* (*Mr. Bovill* was * 664 with them), for the respondents. — The supposed discovery on which the patent was founded had been in use long before the patent was taken out. There is no novelty in this use of the grooved fish. There is here no such modification of an old and known principle as to constitute a new discovery, or a new manufacture. The fastening of joints by grooved supports, hollow in the centre so as to hold the bolts secure, is really a fishing of the joints, and the appellants have merely applied this well-known thing to the uses of a railway. Such an application does not constitute ground for a patent. The discovery of a mere philosophical principle is not ground for a patent; if it was known before, the application of it in a new form, by which a new production is obtained, or even the material modification of an old one is produced, so as to give a new result, or to enable it to be put to a new and beneficial use, may be so, *Boulton v. Bull*,⁶ but nothing of that sort exists here. In *Hall v. Jarvis*,⁷ the old matter was the application of heat to improve the appearance of lace; the patentee too applied heat for that purpose, but in a way totally different from that in which it had been applied before; and this different form of application producing a new and different, as well as improved result, was

¹ 2 Webst. Pat. Cas. 96.

⁵ 5 H. L. Cas. 707.

² Webst. on Property in Designs, 59.

⁶ 8 H. L. Cas. 550.

³ 1 Crompt., M. & R. 919.

⁴ 2 H. Bl. 463; 8 T. R. 95, nom. Hornblower v. Boulton.

⁷ 1 Webst. Pat. Cas. 100.

sufficient to justify the patent. *Hill v. Thompson*¹ is, when the judgments are examined, a case adverse to the appellants. *Crane v. Price*² went to the very verge of the law; but there a * 665 new product was * obtained by a new combination of two old materials; there is nothing of that kind here. The same principle of distinction applies to the cases of *Newton v. Vaucher*,³ *Steiner v. Heald*,⁴ *Higgs v. Goodwin*,⁵ *Booth v. Kennard*,⁶ *Smith v. Northwestern Railway Company*,⁷ *Brunton v. Hawkes*,⁸ and to all the other cases (which they severally referred to), cited on this point on the other side.

Then as to the Hackney bridge. The two things here were really the same for all practical purposes. [THE LORD CHANCELLOR. — Was it not here a new application of a known principle, for the purpose of obtaining a new result?] It was not; the application and even the form of it were the same in both instances. That application in the case of the bridge was known to all mechanics, and brings the case within those of *Carpenter v. Smith*,⁹ and *Tetley v. Easton*.¹⁰

Mr. Grove, in reply, contended that the discovery of a useful modification of a known principle so as to produce a new result, was a good ground for a patent; that was the case here. The use of salt in preserving meat was well known, but suppose that there was some valuable meat which would not receive the salt, and could not thereby be preserved, and any person discovered that the admixture of a third article would make that meat receive the salt and so enable it to be preserved, that would be a good subject for a patent. So in mechanics, if a given thing produced one certain result, but by a different use of it another result of a * 666 valuable kind, * and one hitherto unknown, could be attained, this new application would certainly sustain a patent.

The following question was put to the Judges: Whether the

¹ 1 Webst. Pat. Cas. 229, 8 Taunt. 375, 3 Mer. 622.

² 1 Webst. Pat. Cas. 377, 4 M. & G. 580.

³ 6 Exch. 859.

⁴ 2 Ellis & B. 69.

⁵ 6 Exch. 607.

⁶ 4 B. & Ald. 541.

⁷ Ellis, B. & E. 529.

⁸ 9 M. & W. 300.

⁹ 1 H. & N. 527.

¹⁰ 2 Ellis & B. 956, 2 C. B. N. S. 739.

verdict ought to be entered for the plaintiffs or the defendants ; and if not, whether there ought to be a new trial ?

1865. February 20.

MR. JUSTICE BLACKBURN. — My Lords, by your Lordships' permission, I will now deliver the joint opinion of Mr. Justice Shee and myself. We answer your Lordships' question by saying, that, in our opinion, there ought not to be a new trial, but that the verdict in this case ought to be entered for the plaintiffs.

This answer involves in it a statement that in our opinion the judgment in this case in the Exchequer Chamber was wrong, and should be reversed ; but if we rightly understand the judgment delivered in that case,¹ we do not differ from the Judges who concurred in that judgment, nor from the majority of the Judges who heard the argument at your Lordships' bar, on any question of law, but only on the effect of the facts and evidence stated in the case.

The Statute of Monopolies (21 Jac. 1, c. 3, § 6) excepts from the abolition of monopolies patents for "the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grant shall not use."

In order to bring the subject matter of a patent within this exception, there must be invention so applied as to * pro- *667
duce a practical result. And we quite agree with the Court of Exchequer Chamber that a mere application of an old contrivance in the old way to an analogous subject, without any novelty or invention in the mode of applying such old contrivance to the new purpose, is not a valid subject matter of a patent. There are many decisions to that effect, which were referred to at your Lordships' bar ; and, if the matter were now for the first time to be decided on the construction of the statute, without reference to the cases, we should think, on principle, that such should be the conclusion of the Court. But then in every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims, that there is no invention in the differences, if any, between the old contrivance and that for which the patentee claims a monopoly ; and if there is none, there arises a further question of fact, viz. whether the purpose to which the

¹ 2 Best & S. 216.

contrivance was before applied and the new purpose are so analogous or cognate that there is no discovery or invention in the new application? Whether, in short, it is a mere application or not? For if there is invention or discovery producing a practical benefit, as in the case of *Crane v. Price*,¹ it is the valid subject of a patent. And we think it always must be a question of degree, — a question of more or less, — whether the analogy or cognateness of the purposes is so close as to prevent there being an invention in the application. Mr. Grove, in his very able argument, contended, we believe correctly enough, that if there was any real invention, though a slight one, producing a practical beneficial result, the patent was good. But the question still remains, was there * 668 such an amount of cognateness * in the purposes that there was no real invention or discovery?

In the present case, the point was reserved at the trial on certain agreed facts and findings of the jury, and on the evidence of the models and the specifications. So far as the facts are admitted or found, the Court is bound by them; but on the models and on the specification the Court must draw its own conclusion; and it is here that the difference in opinion between the Judges in the Exchequer Chamber and the majority of the Judges who heard the argument at your Lordships' bar, and ourselves, arises. We differ, not as lawyers, but as mechanics and engineers. We need not say that on such a subject we express our opinion with diffidence, knowing that it will be liable to be criticised by those much more competent to form a judgment on such a point than ourselves; but still we are bound to express the opinion, which, after hearing the very able arguments at your Lordships' bar, we have formed on the engineering and mechanical points.

The patent taken out is for "An improvement in fishes and fish-joints for connecting the rails of railways," and we understand this to be the effect of the evidence.

The rails meet but-end to but-end, and as the engine passes along the rails its weight has a tendency to depress the rail on which it rests, below the rail to which it is approaching, on which the engine does not yet rest; and, unless this tendency is counteracted, the end of the rail to which the engine approaches being more elevated than that on which the wheel of the engine rests, there will be a jolt when the wheel passes over the joint. The

¹ 1 Webst. Pat. Cas. 377, 4 M. & G. 580.

mode of counteracting this tendency is by attaching to the sides of the rails plates called "fishes," by means of bolts and nuts. The plates are at the sides of the * joint and in the hollow * 669 of the double-headed rail, and so long as the fishes are held in that position the one rail cannot be depressed below the other, except in so far as the fish bends. The main strain, therefore, which the fish has to bear, is a strain tending to the flexure of the fish in the vertical plane, which is also the plane of the fish or plate attached to the side of the rails, the forces which tend to push the fish off from the rails being comparatively slight, and being counteracted by the bolts and nuts.

Now the fish which was in use at the time of the plaintiff's patent was a solid plate of equal thickness throughout, and as a strain in the plane of a plate, and tending to produce flexure in that plane, is principally borne by the upper and under parts of such a plate, there was a considerable part of the iron in the centre of the plate which was not brought into play in resisting such a strain.

The plaintiff's invention, as we understand it, consisted in the thought that this superfluous material might be removed, thus producing a groove which he takes advantage of, for the purpose of using it to hold the heads of the bolts, and also producing economy of material, without diminution of strength. These advantages are distinctly pointed out in the specification. The essence of the invention lay in the thought, that inasmuch as the fish was intended to resist a strain in its own plane, the metal in the centre of the fish, which was comparatively inert for the purpose of resisting such a strain, might with advantage be partially removed. The patentee does not in his specification state that the heavy train was to run along the tops of the rails, and that the fish was placed with its plane vertical to resist the vertical strain so produced, nor that the reason why the groove * might be made, * 670 producing economy of material without diminution of strength, was because the plate was so placed, and that such was the strain it had to resist; but we think that all this might be supplied, and was supplied by evidence.

And on the case before your Lordships, we think we are to consider this discovery as producing an improved article; and as being useful; and also new, unless in so far as it was anticipated by the mode in which Mr. Brunel strengthened his bridges, more par-

ticularly by the mode in which he fastened the scarf joint in the Hackney bridge.

Now here again we are obliged to form our own opinion as to the facts from the models ; and so doing, it seems to us that what was done by Mr. Brunel did not at all anticipate the plaintiff's discovery. He used a channelled iron for the purpose of strengthening the beams of a bridge, and in the case of the Hackney bridge for the purpose of strengthening a scarf joint ; but the iron was placed horizontally, for the purpose of resisting vertical pressure. The channelled iron would have been a bad form for resisting a pressure such as is borne by the fish-uniting rails. The two wings would, under such a pressure, we apprehend, collapse together, and the centre snap ; but it was a good form for the purpose of resisting a flexure transverse to the plane of the iron for which it was used ; and what Mr. Brunel did in no way anticipated the plaintiff's idea, founded on the uselessness of the centre part of a plate placed vertically for the purpose of resisting vertical pressure, and used for the purpose of counteracting a tendency to flexure in the plane of the plate. In truth in the plates and channelled iron used by Mr. Brunel in his bridges, the grooves and channels were not formed by removing useless or inert
 * 671 * material, but on, as we apprehend, a totally different principle. He in effect added rims or wings to strengthen the flat plate against transverse flexure ; he did not make a groove by removing the part of a plate used to resist flexure in its own plane.

This is a view of the effect of the facts and evidence quite opposed to that taken by the Judges of the Court of Exchequer Chamber, as expressed in their judgment.

We are of opinion that from the manner in which the point is reserved, the Court below, and your Lordships now on appeal, must decide the question of fact. And if your Lordships take the view which we have submitted, the point on which it is said there was misdirection becomes immaterial, and the verdict ought to be entered for the plaintiffs, whether the direction was correct or not.

MR. BARON CHANNEL. — To your Lordships' question, " Whether the verdict ought to be entered for the plaintiffs or the defendants," for my brothers Keating and Pigott, and for myself, with your

Lordships' permission, I answer that in our opinion the verdict ought to be entered for the defendants. [The learned Judge stated the proceedings which had taken place.]

By the specification, the patentee (after having particularly described the nature of the invention, and the use of it), says, "I claim as the invention the constructing fishes for connecting the rails of railways with a groove, adapted for receiving the heads of the bolts or rivets employed for securing such fishes, and the application of such fishes for connecting the rails of railways in manner thereinbefore described." The advantages of the groove he states to be two, namely, that it serves to *receive the * 672 square head of the bolts, and to prevent their turning round when they are being screwed in, and further, that it renders the fish lighter for equal strength, or stronger for an equal weight of metal, than a fish "if made of equal thickness throughout."

Now such being the nature of the invention as claimed, it is necessary, in order to determine its novelty or validity as the subject matter of the patent, to refer to the evidence and findings of the jury, in order to see what was the state of knowledge and practice on the subject at the period of its date.

The case states, that before the patent the rails of railways were commonly connected by fishes and fish-joints, pieces of iron being attached to each side of the rail, at the joints, by bolts and nuts; that in one pair of fishes the holes were square, and the bolts made with square necks to fit the square holes; that the object of the square holes and bolts was to prevent the bolts from turning round when the nuts were being screwed on, and this object it effectually accomplished; that before the date of the patent, in the construction of several timber bridges, beams of timber had been laid horizontally one above the other, and bolted together with bolts and nuts; that horizontal bars or plates of iron were placed beneath and parallel to and in contact with the beams, and were bolted with the same bolts and nuts; that each of these bars was constructed with a groove in its under surface, which received the square heads of the bolts; and further, that this mode of construction was adopted in order to effect, and did effect, the double purpose of strength and of preventing the heads of these bolts from turning round; but that in these bridges there were no joints to be fished, and that, consequently, there was no fishing in the proper sense of the word. The defendants further proved that

* 673 * the Hackney bridge had been constructed by Mr. Brunel in 1847, in the way stated in the case.

Upon the evidence at the trial, the finding was, "That channel irons upon the railway bridges (independently of the Hackney bridge), were used before the patent, for the double purpose of obtaining increased strength, and preventing the bolt-heads from turning round, but that they were not used for the purpose of fishing."

The result therefore, as to previous knowledge, and as to the nature of the patented invention is, that the use of iron plates for fishes ungrooved was known; that for strengthening timbers in bridges, and bolting them together, the use of iron plates grooved was known; that the special advantages, when so applied, of securing the bolt-heads, and of affording equal strength with less material, were also known.

Then upon this knowledge it is that the patentee claims the application of the groove to the railway fish, and the advantages he propounds are, that it receives the bolt-head, and by means of it, is afforded equal strength with less material, or, in other words, the same advantages as are derivable when applied to the iron plates used in the bridges.

It therefore comes (apart from the Hackney bridge) to the question whether the patentee has, by using the groove in the fish, invented a new manufacture, or has merely transferred a well-known thing to an analogous subject. Now, in our opinion, the law is correctly laid down in the judgment of the Court of Exchequer Chamber, to the effect that "a mere application of an old contrivance in the old way to an analogous subject without any novelty in the mode of applying such old contrivance to the new purpose, does not make a valid subject-matter of a patent."

* 674 * Therefore the point for consideration is thus reduced to this: Whether the fishing of rails meeting but-end to but-end with iron plates bolted together, and the strengthening of solid timbers by iron plates also bolted to the timbers as above stated, are analogous subjects.

It seems to us, upon the fullest consideration we can give to it (though being a question of mere mechanics, we desire to express our opinion with diffidence), that they are analogous. It may be convenient, in considering the matter, to take the advantages of

the groove separately. Now the object of the plates or bars, when applied to both the above subjects, is to afford to them additional support, and thereby to enable the solid bodies, whether iron or wood, to bear pressure. This is effected by the bolted iron plates in both cases, and the advantage of the groove is to render both sets of plates stronger for an equal weight of metal.

The fact, however, seems to be, that a grooved iron plate, when used as a binding support, is as strong at least as the same plate would be if ungrooved, and this discovery was made before the patent, and was given to the world, and, in the language of the Court of Exchequer Chamber, "though not immediately applied it was immediately applicable to all forms of pieces of iron used for holding together other materials."

But it was argued at the bar of your Lordships' House that there was invention at all events in this, that whereas the grooved iron as used in the bridges had been applied for the purpose of binding together pieces of material laid one upon another horizontally, the grooved iron in fishing the rails was applied laterally, in binding together the material, and that its great merit consisted in its performing the novel function of resisting the vertical pressure to which it was exposed, and did so by means of * a plate equally strong, but rendered lighter than that pre- *675
viously in use by the removal of that portion of the plate which was useless in resisting such pressure.

We do not find that any allusion to such an invention as that now suggested was made either at Nisi Prius or in any of the judgments in the Court of Queen's Bench, supporting, or in that of the Exchequer Chamber invalidating, the patent right; nor do we think, looking to the terms of the specification, that Wild ever intended to claim or did claim any such. He certainly does state in his specification that the groove renders the fish lighter for equal strength, or stronger for equal weight, but that as to grooved iron was previously well known, and is a very different thing from claiming the invention as now put forward. If he had intended to claim the discovery that, by the removal of a certain quantity of material from a particular part of the solid plate, in the shape of a groove, the power of resistance to vertical pressure would not be diminished, he would surely have described the sort of groove that would produce that effect with the greatest certainty. If it be true that a groove of a certain width and depth

will produce the effect, it cannot be equally true of grooves of all dimensions.

There is nothing, as we think, stated in the specification to indicate that a resistance to vertical pressure was contemplated, and increasing the diameter of the bolts at the point where the strain is said to be greatest, would seem to point to something different from assisting the fish in resisting vertical pressure.

On looking to the drawing we can see that the groove is well adapted for the purpose to which the specification states it is to be applied, namely, preventing the bolt-head from turning, but * 676 we can find nothing in it to show * us that it at all contemplates a peculiar resistance when placed laterally, as contradistinguished from that which it has when it is placed vertically, against the solid substance which it is designed to strengthen. So in the evidence there is much with reference to the claim to prevent, by means of a groove, the bolt-head from turning, but we cannot discover any finding of any fact bearing upon the resistance to vertical pressure.

What appears to us to show that no such claim was contemplated by the patentee is this, that if the power of resisting vertical pressure produced or affected by the groove would be a merit in the fishes, it would be equally applicable to both; not to one more than the other; yet the patentee himself suggests in one part of his specification, that the inside fish need not be grooved.

Then, as regards the second advantage of the groove in receiving the bolt-head, it seems impossible to say, after its use for the identical purpose in the bridges, whenever it became necessary to fit an iron plate to another material by screws and nuts, that the analogy, for that purpose at all events, is not clear and obvious. It is in this respect only a bare transference.

So that in our opinion, whether the proposed advantages are regarded in detail or as a whole, there is no invention or novelty to support a patent; and upon the latter view we crave leave to refer your Lordships to the judgment in the Exchequer Chamber, with which we entirely agree.

This being the result at which we have arrived on the first branch of your Lordships' question, we have only to add that in our opinion there ought to be no new trial.

As far as we may be allowed to do so consistently with the forms of your Lordships' House, we desire to state that, since the

questions were proposed by your Lordships * to her Majesty's * 677 Judges, some of us have seen Sir Edward Vaughan Williams, who was in attendance on your Lordships during the whole of the argument, and we are authorised to state that he sees no reason for changing the opinion he formed when sitting in the Court of Exchequer Chamber, to whose judgment he was a party, and in which he fully concurs.

July 6.

THE LORD CHANCELLOR (LORD WESTBURY).— My Lords, in this case, in consequence of the difference of opinion between the Court of Queen's Bench and the Court of Exchequer Chamber, and in some degree by reason of the nicety of the subject, which requires some examination, I shall beg leave to trouble your Lordships with a few explanatory observations as the reasons upon which my judgment is founded.

My Lords, you will recollect that in this case the verdict was entered for the plaintiff upon an action for the infringement of his patent, and a rule was afterwards obtained to set aside that verdict, and to enter the verdict for the defendants, which rule was discharged by the Court of Queen's Bench. The matter was then carried under the Common Law Procedure Act to the Court of Exchequer Chamber, where the judgment of the Court of Queen's Bench was reversed.

My Lords, the patent of the plaintiff was taken out by him for the application of fish-joints of a particular construction to the rails of a railway. The denomination of the patent is, "Improvements in fishes and fish-joints for connecting the rails of railways." A fish is something annexed externally to a joint or severance either in pieces of timber or in pieces of iron. A familiar application of the word is well known to sailors when they speak of fishing a broken mast, namely, annexing the * severed * 678 pieces by the aid of lateral bands applied externally. But the application of fish-joints to railways was very well known antecedently to the plaintiff's patent, and the plaintiff's patent accordingly is for an improvement in the shape or character of the fish.

It is very material to observe that the plaintiff describes the fish as used by him to be a piece of iron of the shape of a parallelogram, with a groove or recess in the outer surface, and the groove

is described by him as intended to receive the square heads of the bolts which pass through the fish, and through the body of the tram or rail, and which are fastened on the other side by a nut turning upon a screw, and serving of course to fasten the bolt. The bolt has a square head on the one side, and on the other a nut running up a screw and keeping the bolt firm in its place. Of course it was a desirable thing that the head of the bolt should fit into the recess in the fish, that is to say in the fish-plate, in order to preserve the bolt from being affected by the flange of the wheel of the railway carriage as it ran over the tram. The recess therefore is here described by the plaintiff as serving "to receive the square heads of the bolts and prevent them from turning round when the nuts," which would be on the other side of the rail, "are being screwed on or off." He describes the fish as consisting of two lateral plates, one on the one side of the rail and the other on the other; and he says that the one on the one side may be made without a groove; that is to say, that the lateral plate where the head of the bolt is affixed may be the only plate which is grooved or recessed. He then goes on to use this particular passage, which alone has given rise to any difficulty in my mind, namely, "The groove renders the fish lighter for equal strength, or stronger for an equal weight of metal"; a passage

*679 which *requires some explanation. The plaintiff undoubtedly was aware that as the lateral plate forming the fish is applied perpendicularly to the side of the rail, it would have to endure vertical pressure only. Mechanics and engineers are well aware that when a plate receives a vertical pressure, the impulse, the force of the pressure is sustained by the upper rim of the plate and the lower rim of the plate where it rests on the foundation, and that little or no strain is felt by the central portion of the plate. Accordingly, the plaintiff being aware of that, observes that his peculiar fish might be constructed in such a manner as to save a considerable portion of metal, by having the groove only in the centre of the plate; I mean in the centre of the plate as it is placed horizontally. But it is material to notice that in the description of the plaintiff's invention, and in his claim, he does not advert at all to this peculiarity of a grooved plate, namely, the peculiar result, that if it be grooved the metal may be saved without injury to the efficiency or strength of the plate; and when he sums up his claim as constituting

his invention, it will be found to consist of a very detailed statement of various advantages resulting from the peculiar form and the configuration which he gives to the fish, but no part of the claim will be found to advert to, or to rest upon, the fact that the recess or hollow made in the fish-plate for the reception of the square head of the bolt, is effected by a groove in the plate itself, and that that groove may be made with great advantage in the economy of metal, and without any prejudice in respect of the plate.

At the trial, the novelty of this invention was impeached, on the ground that channelled iron, which altogether corresponded with the grooved fish-plate, had been in use for a considerable period anterior to the * patent, and several examples were * 680 furnished to illustrate that, but in particular, one example in the construction of a railway bridge by the late Mr. Brunel, in which channelled iron was used to a very great extent for the purpose of acting as a support to the beams which were placed transversely, and in which there were scarf joints. In that case, the square heads of the bolts which bolted on the iron that served as a support, or fish, were received in the hollow produced by the channel, and fitted the channel, in order to effect the same object as is here described by the plaintiff, namely, the preventing of the head of the bolt from being turned when the nut was unscrewed.

I particularly wish to point out to your Lordships the difference between the grooved plate and the channelled iron. The centre of the plate of the channelled iron is not cut away at all; it has the same thickness throughout; but it is constructed with two flanges, one at either end, joining the plate at right angles and producing therefore this configuration of the plate, that there is a lateral plate forming the base, having on either side a flange at right angles to the plane of the plate. The difference, therefore, between the grooved fish-plate and the channelled iron consists in this: that the centre of the plate of the grooved fish is cut away by the groove, and part of the metal is taken away, so that the plate is not of a uniform thickness throughout; but in the channelled iron the plate is of a uniform thickness throughout; and instead of a groove formed by hollowing out a recess in the plate, the same object is effected by two flanges, one on either side of the plate which forms the bottom (I am speaking in familiar language) of the channelled iron.

Unquestionably this is a difference, and it would have
 * 681 * raised in my judgment a material question whether, if the plaintiff had pointed out and had rested upon, this difference of configuration as constituting his invention, it would have been possible to set up the anterior use of the channelled iron as depriving him of all claims to that invention; because the true mode of trying the question of course would be to reverse the order of time of the two productions, and to inquire whether if any one had now introduced the channelled iron it would or would not have been an infringement of the plaintiff's patent. If, tried by that criterion, the conclusion should be that the channelled iron would be an infringement of the plaintiff's patent; then, of necessity, it would follow, that as the channelled iron had been in use, and in public and notorious use, preceding the date of the plaintiff's patent, that patent could not be lawfully considered as granted for a "new invention."

My Lords, the learned Judges differed on this point. Two learned Judges, Mr. Justice Blackburn and Mr. Justice Shee, have in a very learned argument pointed out the difference between the mechanical effects produced by the use of the grooved fish-plate placed so as to resist vertical pressure, in the one case, and the mechanical effect produced upon the channelled iron placed so as to resist transverse pressure, in the other case; but I do not think that that of itself would constitute a material difference. The patent is taken out for a fish of a particular configuration; the patent is not taken out for a saving of metal in the construction of the fish-joint, but the patent is limited entirely to the introduction and use of fishes of a particular shape and configuration. Then the question is simply this: whether the channelled iron, which undoubtedly was a fish (and one of the
 objects of the channel was to receive the square heads
 * 682 * of the bolts and to prevent their turning), is not, in truth, substantially the same thing as a grooved plate with a recess hollowed out in its own plane, instead of a hollow being effected by flanges placed on either side of the plate. Regarding the patent as limited to a claim for fishes of a particular configuration, I cannot for a moment doubt that the channelled iron having the same object, and being capable of the same application, substantially involves the fish-plate made with a grooved hollow in the manner which I have attempted to describe.

Then, my Lords, the question is, whether there can be any invention of the plaintiff in having taken that thing which was a fish for a bridge, and having applied it as a fish to a railway. Upon that I think the law is well and rightly settled, for there would be no end to the interference with trade and with the liberty of adopting any mechanical contrivance, if every slight difference in the application of a well-known thing should be held to constitute ground for a patent. There is the familiar contrivance of the button to the button-hole taken from the waistcoat or the coat, which may be applied in some particular mechanical combination in which it has not hitherto been applied; but it would be an idle thing, if it were possible, to take a well-known mechanical contrivance, and, by applying it to a subject to which it has not hitherto been applied, to constitute that application the subject of a patent to be granted as for a new invention. No sounder or more wholesome doctrine, I think, was ever established than that which was established by the decisions which are referred to in the opinions of the four learned Judges who concur in the second opinion delivered to your Lordships, namely, that you cannot have a patent for a well-known mechanical contrivance merely when it is applied in a manner or to * a * 683 purpose, which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hitherto notoriously used. The channelled iron was applied in a manner which was notorious, and the application of it to a vertical fish would be no more than the application of a well-known contrivance to a purpose exactly analogous or corresponding to the purpose to which it had been previously applied.

Therefore, my Lords, with some anxiety upon this subject, and feeling that the intricacy of the matter must render it impossible to convey one's ideas in words unless one perpetually referred to drawings or models, I think that, upon the whole, I must advise your Lordships and move your Lordships to confirm the decision of the Court of Exchequer Chamber, that there was no novelty in the patent, and that therefore there was a misdirection on the part of the Lord Chief Justice. The consequence will be that I shall move your Lordships to affirm the judgment of the Court of Exchequer Chamber, and to dismiss the appeal with costs.

LORD CRANWORTH. — My Lords, in this case I concur with the

opinions of Barons Channell and Pigott, and Mr. Justice Keating, assented to, as we understand, by Sir Edward Vaughan Williams. Their reasons are so fully and so clearly given that I need hardly do more than say that I adopt them.

The case finds that before the date of the letters patent, it had been usual to fasten and bolt together with bolts and nuts, beams of timber laid horizontally over one another, and traversing railway bridges, and that under these beams horizontal plates or bars of iron were placed parallel to and in contact with the beams, and were fastened by the same bolts and nuts which fastened *684 the *beams. These bars were all constructed with a groove on their under surface, which received the square heads of the bolts, this mode of construction having, as the case finds, been adopted for the double purpose of preventing the bolt-heads from turning round, and also of giving strength to the beams.

It was also found by the case that before the date of the letters patent, the rails of railways had been usually connected by iron fishes applied and fastened precisely as those mentioned in the specification, though not grooved.

I cannot think that the adoption of the groove in the plates used for fishing railway joints, as it had been previously used in the beams of bridges, is an invention capable of sustaining a patent. It is the mere application of an old contrivance in the old way to an analogous subject without novelty in the application. I say without novelty, for I cannot think that the mere fact of the application being made laterally in the case of the rails instead of under the surface of the beams, as in the case of the bridges, can be treated as a novelty; nor indeed do I find in the specification any claim of novelty on such a ground.

This would have been the conclusion at which I should have arrived, even if there had not been the case of the Hackney bridge. In that bridge the span was too great to be traversed by a single beam, and there were therefore two beams, one on each side, joined in the middle by scarf joints, and under the beams were transverse planks traversing the whole width of the bridge. Along and under the ends of these planks on each side of the bridge, a long bar of grooved iron was placed under the connected beams, which passed from one end of the bridge to the other.

Bolts with square heads passed through these grooved iron *685 bars, and through both the planking and *the beams all

along the bridge ; and the case finds expressly that the groove was used for the double purpose of preventing the square heads of the bolts from turning round, and of making the bars lighter for equal strength of metal, or stronger for an equal weight of it. This seems to me to have been the use of grooved iron for the very same purpose as that for which it is claimed by the patent.

On these grounds, I think that the judgment of the Exchequer Chamber was right, and ought to be affirmed.

LORD WENSLEYDALE (having stated the case and the findings), said : After considering these arguments, especially that of the Judges of the Exchequer Chamber, delivered by Mr. Justice Willes, and that delivered in this House by Mr. Baron Channell, I have satisfied myself that the alleged discovery of the plaintiff had no such novelty in it as to entitle it to a patent. His plan was to attach to the sides of the railway, under the joints of the rails, plates or fishes of iron, grooved, which clearly means channelled from end to end, without flanges, so as to be adapted for receiving the heads of the bolt, which are prevented from turning round when the nuts are screwed on. A similar process had been used long before in the case of pieces of timber lying horizontally on one another, and each constructed with grooves, which received the square heads of the bolts, and prevented the heads of the bolts from turning.

I agree entirely that the application of this principle laterally which had before been applied horizontally, the application to the sides of a railway of the same principle which had long been in practice for securing the sides of pieces of timber lying on each other to the sides of * timber placed in contact with * 686 them, is not such a novelty of invention as to be a sufficient warrant for a patent. It is so clearly connected with the former practice as not to have the merit of a new discovery.

On this ground, therefore, I entirely agree with the majority of the learned Judges in the view they have taken and so clearly explained in this case.

It is unnecessary to give any opinion on the question whether the patent was not void on the ground that a similar mode of using grooved pieces of wood occurred before the patent, in the construction of the Hackney bridge ; but I am much disposed to approve

the opinion of Mr. Justice Willes on that subject, contained in his judgment in the Court below.

Judgment affirmed, and appeal dismissed with costs.

Lords' Journals, 6th July, 1865.

MERSEY DOCKS v. GIBBS, AND MERSEY DOCKS v. PIERCE.

1864. July 4, 5, 6. 1865. June 29, 30. 1866. February 22; June 5.

"The MERSEY DOCKS and HARBOUR BOARD"	}	<i>Plaintiffs in Error.</i>
TRUSTEES,		
WILLIAM GIBBS and Others,	}	<i>Defendants in Error.</i>
and		
"The MERSEY DOCKS and HARBOUR BOARD"	}	<i>Plaintiffs in Error.</i>
TRUSTEES,		
PIERCE, W. PENHALLOW and Others,	}	<i>Defendants in Error.</i>

Public Trusts. Corporations. Negligence, Damages for Injuries occasioned by. Trust Funds.

Persons who have a duty to perform, and who may be made responsible for injuries if they know of causes of mischief which in the discharge of that duty they ought to remedy, are equally responsible if they negligently remain ignorant of those causes of mischief, and so leave them unremedied.

* 687 * A private person, or a company, having a right to levy tolls in respect of the performance of a particular work, will be liable in damages for injuries occasioned by performing it improperly. *Parnaby v. The Lancaster Canal Company*, 11 A. & E. 228, approved of.

A corporate body authorised to perform such a work, and receiving tolls in respect of it, though obtaining no profit for itself from such tolls, but collecting them for the maintenance of the work and the possible future benefit of the public, is equally responsible for injuries arising from the improper performance of such work, and the funds thus obtained must discharge that liability.

Per LORD WESTBURY. — Trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust.

Per LORD WESTBURY. — Some of the observations of Lord Cottenham in *Duncan v. Findlater*, 6 Clark & F. 894, commented on and controverted.

Metcalfe v. Hetherington, 11 Exch. 257; 5 H. & N. 719, commented on.

In these cases Gibbs and others were the owners of a cargo of guano which had been shipped on board the "Sierra Nevada," and Penhallow and others were the owners of that vessel. The defendants constituted "The Mersey Docks and Harbour Board,"¹ and the two * actions were brought to recover * 688 damages for injury to the cargo and to the ship, occurring while the vessel was endeavouring to enter the Liverpool Docks. The same question as to the liability of the trustees arose in each case, but came before the Court in a different form.

In the case of Gibbs the declaration contained two counts. The first count alleged that the plaintiffs were the owners of a cargo of guano on board the "Sierra Nevada," and that the said ship had arrived at the port of Liverpool, and that the defendants were the owners and proprietors of a certain dock in the said port, called the Wellington Dock, made and constructed by them under the powers of certain Acts of Parliament, and by virtue of the said Acts they were entitled to receive port dues, &c., in respect of vessels navigating the said port, and the said dues, &c., it was their duty, under the same Acts of Parliament, to apply and dispose in and about, amongst other things, the maintaining, cleansing, sup-

¹ The management of the Liverpool Docks was formerly in the Liverpool Dock Trustees, but is now vested in "The Mersey Docks and Harbour Board." The Liverpool Dock Acts are very numerous (see *The Mersey Dock Trustees v. Cameron*, and *The Mersey Dock Trustees v. Jones*, ante, 443); but those principally relating to the present case are 51 Geo. 3, c. 143, and the 6 Geo. 4, c. 187. By section 82 of the earlier Act, the harbour masters and dock masters (appointed by the trustees) are empowered to direct the time and manner of every ship coming into the docks. By section 86, a penalty is imposed on any master bringing a vessel into the docks contrary to their directions. By section 134 of the later Act, the masters are empowered from time to time, as they shall see occasion, to pay, out of the rates by this Act authorised to be levied, the amount of any damage occasioned by the insufficiency of the present or any future works by this or the said Acts authorised to be established, or the amount of any damage sustained by the negligence or misconduct of any officers or servants employed by the trustees while acting under the orders and directions of the trustees. By this Act a committee was appointed to carry into execution the powers of the Liverpool Docks Acts, twelve to be nominated by the corporation and eight by the merchants of Liverpool. The resolutions of this committee were to be final unless annulled by the trustees at a general monthly meeting.

The mode of appointing the trustees themselves is fixed by the 14 & 15 Vict. c. 64, by which certain members of the Corporation of Liverpool and persons elected by the ratepayers are made to constitute the body, and the dock property is vested in them.

porting, and preserving the said docks so as to be in a fit state for vessels entering into and navigating the same. Nevertheless, although the dues received were adequate to the maintaining, &c. of the docks, yet the defendants neglected their duty, and did not take due and reasonable or any care in or about the maintaining, cleansing, supporting, or preserving the said dock, insomuch

* 689 that * the said vessel, in duly endeavouring to enter into and navigate the said dock, struck against, and became embedded in, a large bank or mass of mud remaining, by and through the negligence of the defendants, in and about the entrance to the said dock, and in consequence thereof was damaged, and water and mud entered the same and damaged the said guano. And the defendants also neglected their duty in this, that well knowing that the said Wellington Dock and the entrance thereto was by reason of certain great accumulations of mud therein, in an unfit state to be used and navigated by vessels, &c., they did not take due and reasonable care to put the same into a fit state for that purpose, but, on the contrary thereof, negligently suffered and permitted the said dock and the entrance thereof to be and continue while the same was, as they well knew, and by their permission, navigated and used by such vessels, in an unfit state to be so navigated and used, for want of necessary and reasonable cleansing, insomuch, &c., that the said vessel in endeavouring to enter the dock became embedded in the mud, &c., and water and mud entered the vessel and damaged the guano.

The trustees pleaded, firstly, Not guilty; secondly, that they were not the proprietors of the said dock as alleged; thirdly, that they are not entitled to receive the dues, &c., and to dispose of them as alleged; and fourthly, they demurred to the whole declaration. The plaintiffs took issue on the pleas, and joined in demurrer. In Michaelmas term, 1856, the Court of Exchequer gave judgment on the demurrer in favour of the trustees,¹ on the ground that the case was governed by that of *Metcalfe v. Hetherington*.² The plaintiffs brought * error on that judgment, which was reversed in the Exchequer Chamber;³ the decision in the Exchequer Chamber distinguishing *Metcalfe v. Hetherington*, and adopting *Parnaby v. The Lancaster Canal Company*.⁴

¹ 1 H. & N. 439.

² 3 H. & N. 164.

³ 11 Exch. 257.

⁴ 11 A. & E. 223.

The issues of fact came on to be tried before Mr. Baron Martin at the Liverpool Summer Assizes, 1858, when a verdict was found for the plaintiffs.

Messrs. Penhallow & Co., the owners of the ship, also brought an action against the trustees, which was founded on the same facts, and the declaration in which was similar in form to that in *Gibbs's Case*. The defendants pleaded not guilty, and that the plaintiffs were not the owners of the ship as alleged. This action came on for trial before Lord Chief Baron Pollock at the Middlesex sittings after Michaelmas term in 1859. The learned Judge directed the jurors that if, in their opinion, the cause of the injury to the ship was a bank of mud in the dock, and that the defendants by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable in damages. A bill of exceptions was tendered to this ruling, on the ground that the Lord Chief Baron ought to have directed the jury, that if the cause of the misfortune was a bank of mud at the entrance of the dock, the defendants were not liable unless they or their servants knew that the entrance was, by reason of the said bank of mud, in an unfit state to be navigated, or knew that it was in a dangerous condition for ships navigating the same. The jury found a verdict for the plaintiffs. The Exchequer Chamber overruled the bill of exceptions.¹

The trustees constituting the Mersey Docks and Harbour

* Board brought error on the judgment in each of the cases. * 691

The Judges were summoned, and Mr. Baron Channell, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Justice Shee, and Mr. Baron Pigott attended.

Sir F. Kelly and Mr. Mellish (Mr. Quain and Mr. Parker were with them), for the plaintiffs in error. — The trustees here constitute a body entirely of a public character, and even assuming them to have been guilty of a misfeasance (which is denied), the principle which is laid down in *The Feoffees of Heriot's Hospital v. Ross*,² must be applied in protection of the funds which they administer. The act here complained of as wrongful was not done by them or by their order, but was the act of the dock master or his servants. Under such circumstances the action cannot be maintainable against the dock trustees, nor is the property which

¹ 7 H. & N. 329.

² 12 Clark & F. 507.

they hold as trustees, and which bears the character of public property, liable to make good the damage. The trustees cannot be liable; for, firstly, their character and duties are of a public nature; secondly, they have no salaries, but perform their duties gratuitously; and, lastly, the funds in their hands are specifically appropriated to the maintenance of the docks, and if there should be any surplus, to the reduction of the dock dues; and the funds cannot be made liable for any thing but what is expressly done by their order.

It is said in Brooke's Abridgment,¹ "If a highway be out of repair, by which my horse is mired, I shall not have
 * 692 * an action against him who ought to keep the highway in repair, for it is a public matter, and shall be reformed by presentment." The principle thus laid down is one which has been acted on in the subsequent cases: *Russell v. The Men of Devon*,² *Lane v. Cotton*,³ *Whitfield v. LeDespencer*,⁴ *Sutton v. Clarke*.⁵ In the last the subject was very fully discussed, and Chief Justice Gibbs declared that in such a case a public officer was not liable but for acts of wilful or personal impropriety. *The Governor, &c. of the Cast Plate Company v. Meredith*,⁶ *Harris v. Baker*,⁷ and *Hall v. Smith*,⁸ strongly enforced that principle. [LORD WENSLEYDALE. — Some of those cases were decided before it had been determined that where a man carried on an independent trade, the person who employed him to do the work of that trade was not liable for injuries arising from his mode of doing it.] In *Humphreys v. Mears*,⁹ trustees of a public road were held not liable unless they personally interfered. And then came the case of *Duncan v. Findlater*,¹⁰ which, though a Scotch case, proceeded upon principles of English law, and decided that the trustees of a public road and the funds intrusted to them were not liable for injuries occasioned by the acts of those employed under them; *Metcalfe v. Hetherington*¹¹ followed, where the facts were almost identical with those of the present case, the only difference (quite immaterial for this argument) being that there was no averment in

¹ *Action sur le Case*, pl. 93, referring to 5 Edw. 4, 3. The case is really to be found 5 Edw. 4, E. T. p. 2, pl. 24.

² 2 T. R. 667.

³ 1 Salk. 17, 1 Ld. Raym. 646.

⁴ Cowp. 754.

⁵ 6 Taunt. 29.

⁶ 4 T. R. 794.

⁷ 4 M. & S. 27.

⁸ 2 Bing. 156.

⁹ 1 Man. & R. 187.

¹⁰ 6 Clark & F. 894.

¹¹ 11 Exch. 257.

that case that the trustees possessed funds to discharge the supposed liability. There the trustees * were held not * 693 liable. In *Boulton v. Crowther*,¹ it was declared that trustees are not liable for a consequential injury resulting from an act which they are authorised to do. To make them liable, personal misfeasance, or at all events personal negligence, must be proved against them. Here there was no duty in the trustees to clear away the mud-bank; their duty was confined to making by-laws and giving proper directions. If those by-laws and directions were disregarded by the harbour master, he alone was responsible for his own acts. In *Holliday v. St. Leonard's, Shoreditch*,² a vestry which was bound by Act of Parliament to execute the duty of surveyor of highways within its parish, was held not responsible for an injury occasioned to a passenger by the negligence of the workmen employed by the surveyor appointed by such vestry, when the vestry itself had not given any orders for the execution of the work. These trustees cannot be assimilated to a private company trading for its own profit. The decision in *Parnaby v. The Lancaster Canal Company*³ made the company liable; but that was because it was a private company and not a public body; because it obtained profits from its tolls, and did not gratuitously perform a public work, in the profits of which the public alone were interested. The judgment in the case of *The Southampton Bridge Company v. The Southampton Local Board of Health*⁴ proceeded entirely on the ground that the Board was, by its own act, made *eo nomine* liable; and a similar ruling governed the decision in *Ruck v. Williams*.⁵ But in *Coe v. Wise*,⁶ where the defendants were the commissioners of the * Middle Level drain- * 694 age, and were trustees for a public purpose, acting without reward, they were held not to be liable for the negligent conduct of the persons employed by them, who allowed a sluice originally well made to become defective, by which great damage was caused to the neighbouring proprietors.

Then as to the bill of exceptions. The allegation that the trustees had the means of knowledge is not sufficient; they ought to be shown to have had a knowledge of the existence of the mud-bank and of its dangerousness. It was said that that difficulty

¹ 2 B. & C. 703.

² 11 C. B. N. S. 192.

³ 11 A. & E. 223.

⁴ 8 Ellis & B. 801.

⁵ 3 H. & N. 308.

⁶ 5 Best & S. 440.

was obviated by the allegation of general negligence; but on that would arise the question, whether it was the duty of the trustees, in their corporate character, to take means to ascertain whether the dock was encumbered with a mud-bank. The direction is wrong, because it proceeds on the supposition that the trustees having the means of knowledge of the existence of the mud-bank, were liable for negligence in not having removed it. On this point *Bain v. The Whitehaven Railway*,¹ *Anderson v. Fitzgerald*,² *The Bank of Ireland v. Evans Charities' Trustees*,³ and *Bush v. Fox*⁴ were cited.

The Solicitor General (Sir R. P. Collier) and Sir H. Cairns (with whom were *Mr. Cleasby, Sir G. Honeyman, and Mr. Vernon Lushington*), for the respondents, in the two cases of Gibbs and of Penhallow. — There is nothing to distinguish these trustees from a

trading company conducting and managing docks for profit,
* 695 as in London; but even assuming them to be a * public body, that will not exempt the funds in their hands from liability for damage caused by the negligence of their servants. It is not sought to make them individually liable. These considerations reconcile all the cases. The fact that some or even all these trustees were members of the corporation would not confer on the body any irresponsibility. A corporation itself may be a trading company, though not for its own advantage, and may be liable, *Scott v. The Mayor, &c. of Manchester*,⁵ where the defendants were held liable for the negligence of their workmen in laying down gas-pipes in the borough. It is true that there was in that case an allegation in the declaration respecting the possession of funds to meet such a liability; but that was inserted merely to meet a difficulty supposed to arise in *Metcalf v. Hetherington*.⁶

But assuming the trustees have not to bear the character of a trading company, still they are liable. [THE LORD CHANCELLOR (LORD WESTBURY). — But how could the remedy against them be enforced by taking possession of their property, their docks, and warehouses?] That, however, need not to be discussed now. In assuming what is called a public trust, they accepted a duty for the non-performance of which they might be subject to an indict-

¹ 3 H. L. Cas. 1.

² 4 H. L. Cas. 484.

³ 5 H. L. Cas. 389.

⁴ 5 H. L. Cas. 707.

⁵ 1 H. & N. 59, affirmed 2 H. & N. 304.

⁶ 11 Exch. 257, 5 H. & N. 719.

ment, and for any particular damage sustained by an individual to an action. In *Ruck v. Williams*,¹ Lord Chief Baron Pollock says, "I see nothing in the character of the commissioners, as a public body, or in the fact that they are discharging a public duty without any remuneration, to exempt them from liability to compensate a person who has suffered by their carelessness in *the per- * 696 formance of their duty." *The Mayor, &c. of Lyme Regis v. Henley*.² [LORD CRANWORTH. — Then the corporation got property on condition of performing the duty.] In *Sutton v. Clarke*³ it was distinctly added in judgment that if commissioners acted wrongfully they would be liable; but in that case there was no act of negligence by the trustees themselves, nor was there any in the *Cast Plate Company v. Meredith*.⁴ But still it is the duty of commissioners to do work within their statutory authority in a careful manner, *Jones v. Bird*.⁵ In *Harris v. Baker*⁶ the decision proceeded on the ground that the Act of Parliament did not give the action, but it was said that the commissioners might be indicted for the negligence; the distinction being probably founded on the authority of the case already referred to in Brooke's Abridgment.⁷ In *Hall v. Smith*⁸ the commissioners were not held responsible because the surveyor and contractor were treated as persons independent of them, and on that account responsible; but even then Lord Chief Justice Best said,⁹ "If commissioners under an Act are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action." It was not, therefore, their character as public commissioners that freed them from liability. And that principle was really adopted in *Whitehouse v. Fellowes*.¹⁰ And in *Cowley v. The Mayor, &c. of Sunderland*,¹¹ where the corporation authorities had undertaken, under *the powers of an Act of Parliament, to erect * 697 bathis and washhouses, it was held that the duty thus undertaken must be discharged with care and diligence, and that they were liable in damages for injury caused to an individual by what they had done. *The Southampton Bridge Company v. The South-*

¹ 3 H. & N. 308.² 2 Clark & F. 331.³ 6 Taunt. 29.⁴ 4 T. R. 794.⁵ 5 B. & Ald. 837.⁶ 4 M. & S. 27.⁷ *Action sur le Case*, pl. 92. Ante, 691, n. (h).⁸ 2 Bing. 156.⁹ 2 Bing. 159.¹⁰ 10 C. B. N. S. 765.¹¹ 6 H. & N. 565.

ampton Board of Health,¹ *Ruck v. Williams*,² and *Coe v. Wise*³ establish the same rule. The cases of the Postmaster-General and of other public officers do not apply here, for in them the individuals actually guilty of the wrong hold a special and independent office, and had particular duties imposed on them. And in the same way the captain of a ship may not be liable for the negligence of his crew, for the men are not his servants, but the servants of the owner. That distinction accounts for the decision in *Holliday v. St. Leonard's, Shoreditch*.⁴ The case of *Parnaby v. The Lancaster Canal Company*⁵ proceeded on the true principle that by the principles of the common law where a duty was undertaken it must be properly discharged, and that those who undertook it and did not so discharge it were answerable; and the funds administered by such persons are liable to make good any injury occasioned by their neglect to discharge that duty. The case of *Metcalfe v. Hetherington*⁶ is not in point. The first decision in that case was on a formal point raised on demurrer; the other was on the case itself, and that was really made to depend on the fact that Mr. Justice Blackburn said that not only the trustees, but the harbour master himself was not aware of the insecurity of the har-

* 698 bour; and Lord Chief Justice Cockburn said, * "Assuming it to be made out that there was some negligence on the part of the harbour master, can it be said that there was such negligence on the part of the trustees as to make them responsible. If called upon to decide the question as a matter of fact, I should answer it in the negative." In like manner *Duncan v. Findlater*,⁷ and *The Feoffees of Heriot's Hospital v. Ross*,⁸ do not apply to the present case; for the first was decided on the words of a particular Act of Parliament, and the second on the absence of any settled course of authority in such cases in the Scotch law. Some of the observations of Lord Cottenham in the latter case might however be referred to, as showing that in the present instance the present action is sustainable, for his Lordship then said that he could find no direct authority in the Scotch law for allowing damages to be taken from trust funds. Here the Act of Parliament contemplates impropriety in the exercise of the powers of the Act, and expressly provides funds which may be applied to meet the damages.

¹ 8 Ellis & B. 801.² 11 C. B. N. S. 192.³ 6 Clark & F. 894.⁴ 3 H. & N. 308.⁵ 11 A. & E. 223.⁶ 12 Clark & F. 507.⁷ 5 Best & S. 440.⁸ 11 Exch. 257, 5 H. & N. 719.

There is no objection to the direction. The declaration alleged that the defendants, well knowing, &c., neglected to do what was necessary, and the evidence showed that but for negligence the existence of the mud-bank and its dangerousness must have been known, and could have been remedied. Negligence, as Mr. Baron Bramwell observed in *Ruck v. Williams*,¹ "Negligence is a relative term." If the defendants, by their servants, had the means of knowledge, and were negligently ignorant, they are properly liable.

Mr. Mellish, in reply. — It may be admitted that the trustees, though discharging * a public duty without indi- * 699 vidual profit, might be liable for their own wilful default, but there is no pretence of that kind here. If they appointed proper officers to perform the required duties, and nobody doubts that they did, they were not liable on account of any defect in the mode of discharging those duties adopted by those officers, *Holliday v. St. Leonard's, Shoreditch*.² Nor are the funds in their hands liable, *Duncan v. Findlater* ;³ *The Trustees of Heriot's Hospital v. Ross*.⁴

The second breach, which alleges that the trustees, well knowing that the entrance to the docks was unfit for navigation, did not take due and reasonable care to put its entrance into a proper state, cannot be sustained. It puts on the trustees a duty which by the Dock Acts was put on the harbour and dock masters, and the injury was the result of their negligence alone, with which the trustees had nothing to do ; but there was in reality no evidence to show that the trustees were guilty of negligence, either by themselves or their servants.

THE LORD CHANCELLOR moved that the following questions should be put to the Judges : In the *Mersey Trustees v. Gibbs*, "Does the declaration in this case state a good cause of action ?" In the *Mersey Trustees v. Penhallow*, "Is the judgment of the Court of Exchequer Chamber right ?"

MR. BARON CHANNELL, in the name of his brethren, requested time for considering these questions.

Ordered.

¹ 3 H. & N. 318.

² 11 C. B. N. S. 192.

³ 6 Clark & F. 894.

⁴ 12 Clark & F. 507.

1866. February 22.

MR. JUSTICE BLACKBURN. — My Lords, I have the honour, in answer to your Lordships' questions in these cases, to deliver the joint opinion of all the Judges who heard the argument.

* 700 * The two actions before your Lordships, though arising out of the same transaction, do not come before your Lordships' House in precisely the same manner. In *Gibbs v. The Mersey Board* (the action by the owner of the cargo) the question is raised by a demurrer to the declaration, on which all the material averments must be considered as admitted to be true. The damages are assessed on the second count, and it is to the averments on that count that your Lordships' attention should be directed. On this record it is admitted by the demurrer that the defendants, the trustees of the docks, knowing that the dock and its entrance was, by reason of accumulations of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state whilst, as they well knew, it was used by vessels, and that the damage arose in consequence.

In the action of *Penhallow v. The Mersey Board* (the action by the shipowner), the averments in the second count are similar to those in the first action; but they are not admitted by a demurrer. The question was raised at Nisi Prius on the plea of not guilty, which the jury found for the plaintiffs; but the charge of the Lord Chief Baron is brought before your Lordships by a bill of exceptions, by which it appears that he told the jurors that if in their opinion the cause of the misfortune was a bank of mud, and the defendants by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, then in his opinion the defendants were liable; obviously meaning, that if the jurors so thought they ought to find the issue for the plaintiffs.

The exception taken to the summing up was, that even if
* 701 the jury thought the cause of the misfortune * was a bank of mud, the defendants were not liable unless they knew that the dock and entrance were, by reason of the said mud-bank or otherwise, unfit for navigation. That is the only exception.

Mr. Mellish, in the course of his very able reply at your Lordships' bar, contended that the statement in the bill of exceptions disclosed no evidence to go to the jury of negligence on the part of

the defendants or their servants. But that is not the exception on the record; and we need hardly remind your Lordships that the party tendering a bill of exceptions is confined to the exceptions he makes at the trial. This is not a merely technical answer; had the exception been that there was no evidence of negligent ignorance fit to be left to the jury, the whole of the evidence bearing on that point would have been set out on the record, and then the Court of Error could have formed a judgment whether it was sufficient or not; as it is, the record contains no more of the evidence than is necessary to explain the exception really made at the trial, viz. that the Chief Baron told the jury, in effect, that it was not necessary to prove knowledge on the part of the defendants or their servants of the unfit state of the docks, and that proof that the defendants, by their servants, had the means of knowledge, and were negligently ignorant of it, would entitle the plaintiffs to the verdict.

The Court of Exchequer Chamber based the judgment in each of the cases on that of the Court of Exchequer Chamber in the *Lancaster Canal Company v. Parnaby*.¹ In that case the defendants were a company incorporated by Act of Parliament for the purpose of making and maintaining a canal to be open for the use of the public on * payment of rates, which * 702 the defendants were empowered to receive for their own proper use and behoof, i. e. to be divided amongst the shareholders. And the Court of Exchequer Chamber in that case stated the law thus:² "The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property."

In the present cases the trustees do not receive the dock rates for their own use and behoof, i. e. to be divided amongst themselves or their shareholders; but they are bound by the statutes under which they are incorporated to apply them to the purposes of the Acts, which may in substance be stated to be to maintain the docks and pay the very large debt contracted in making them.

¹ 11 A. & E. 230.

² 11 A. & E. 242.

The Court of Exchequer Chamber. in both cases decided that this difference did not affect the question ; that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger, was equally cast on the persons having the receipt of the tolls and the possession and management of the dock, whether the tolls were received for a beneficial or a fiduciary purpose.

If this proposition is correct, the direction of the Lord Chief Baron excepted to was right, for a body corporate never can
 *703 either take care, or neglect to take care, except * through its servants ; and (assuming that it was the duty of the trustees to take reasonable care that the dock was in a fit state) it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit. And after hearing the very able arguments at your Lordships' bar, we are of opinion that the judgment of the Court of Exchequer Chamber was correct.

It is pointed out by Lord Campbell in *The Southampton and Itchin Bridge v. The Southampton Local Board*,¹ that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. It is desirable, therefore, in the first place to state, what was the effect of the legislation, so far as it applied to these docks, at the time of the accident on the 12th April, 1855.

The docks in Liverpool have been made at different times, under a great many different Acts of Parliament, the earliest being the 8 Anne, c. 12. At the time when the mischief happened which gave rise to these actions, the latest of the Acts was the 14 & 15 Vict. c. 64. All these numerous statutes are public Acts, of which the Courts must take judicial notice ; and as many of the statutes were at that time still in force, though their provisions had been in many respects varied by those subsequently passed, it is extremely difficult to ascertain with precision what was, at the time of the accident, the exact state of the legislation peculiar to those docks. But having had the assistance afforded by the able and industrious counsel who argued at your Lordships' bar,

¹ 8 Ellis & B. 801, 812.

we *think we may venture to say that the effect of the *704 material parts of the statutes is the following:—

The members of the Town Council of Liverpool and their successors were formed into a corporation by the style of “The Trustees of the Liverpool Docks.” By Statutes 51 Geo. 3, c. 143, § 2, 6 Geo. 4, c. 87, § 3, and 14 & 15 Vict. c. 64, §§ 2, 3, and 4, the powers of this corporation were to be exercised by a committee. On this Mr. Mellish founded an argument which we shall notice afterwards. Subject to these provisions we may say that the effect of the legislation was, that the dock trustees were empowered to make and maintain docks and warehouses, which were to be open to the use of the public, paying dock rates for the use of the docks and warehouse rates for the use of the warehouses. The same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively, that would have been supplied by any ordinary dock and warehouse proprietors to their customers. Powers are given to the trustees of the Liverpool Docks from time to time to close the docks for the purpose of cleansing and repair. General powers are given to them to appoint officers and servants; but the duties of those officers and servants are not in any place defined in the statutes, except by Statute 51 Geo. 3, c. 143, §§ 80, 81, 82, 84, 85, and 86. By those sections the water-bailiff or harbour master, or any one dock master, has power to remove wrecks and obstructions, and to regulate the time and manner in which vessels shall enter and leave the docks; and penalties are imposed on those who disobey the orders of those officers.

On these latter sections, and on the decision of the Court of Exchequer in *Metcalf v. Hetherington*,¹ an *argument *705 was raised for the defendants, which we will notice afterwards. At present we will only observe that such powers are almost essential for the due use of any dock; and that, accordingly, it has been for many years the practice to insert similar clauses in all harbour and dock Acts, whether for private companies or public bodies. And in “Harbour, Docks, and Pier Clauses Act, 1847” (10 & 11 Vict. c. 27), the clauses commonly in use are collected under the head “and with respect to the appointment of harbour masters and pier masters and their duties.” It will be found on examining them that section 56 in the General Act is

¹ 11 Exch. 257, 5 H. & N. 719.

equivalent to section 80 in the 51 Geo. 3, c. 148; and that the other powers given to the officers of the Liverpool Dock trustees are also given to the officers of all dock companies, whether created for public or for private purposes, and incorporated by any particular Act, or incorporated by "The Harbours, Docks, and Piers Clauses Act, 1847" (10 & 11 Vict. c. 27).

By a general appropriation clause, 51 Geo. 3, c. 148, § 29, all the revenues of the trustees of the Liverpool Docks are to be applied in the first instance to making and maintaining the docks, paying the interest on the large debt secured on the dock rates, and to paying "all the charges and expenses already incurred, or hereafter to be incurred, in the carrying into execution, or under or in consequence of, any of the former Acts or this present Act; and the residue in paying off the principal moneys of the debt." And when it is all paid off, the trustees are required to lower and reduce the rates, "as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, &c., and improving, repairing, and maintaining
* 706 * the same, and for the carrying into execution the provisions of this Act, and the former Acts."

By subsequent enactments the trustees of the Liverpool Docks are enabled to raise much more money on bonds, and to make much more extensive works; but in substance this clause still, at the time of the accident, remained the clause governing the appropriation of all moneys received by the trustees of the Liverpool Docks, including the moneys paid for the use of the docks and the warehouses.

There are some peculiar enactments in one of the statutes (6 Geo. 4, c. 187, §§ 180 - 186) which were relied upon as showing the intention of the Legislature, on which we shall remark afterwards; but, with this exception, there is nothing in the statutes either extending or limiting the liability of the dock trustees to those paying for the use of the docks, so as to make it different from that which the general law would cast upon them under such circumstances. And consequently, in our opinion, the great question in both these actions is, What is the duty which the general law does cast upon corporations being the proprietors of docks maintained under such enactments?

Now, it is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates

for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid.

* It is well observed by Mr. Justice Mellor in *Coe v. *707 Wise*,¹ of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions, on a large scale, for individual enterprise. And we think that, in the absence of any thing in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. If, indeed, the Legislature has by express enactment or necessary intendment enacted that they shall not be subject to such a liability, there is an end of the question; and if the Legislature had in the Acts now under consideration, enacted that none of the revenue of the trustees of the Liverpool Docks should be applied to the purpose of discharging liabilities incurred in consequence of the trustees acting as proprietors of docks and warehouses, it would go far to show that the Legislature intended that they should not be so liable. But the appropriation clause in the Acts now under consideration has no such effect. It was indeed supposed by the Court of King's Bench, in *Rex v. Liverpool*,² that its effect was to prohibit the payment of poor rates; but your Lordships' House has decided in the recent case of *Jones v. Mersey Board*,³ that this was a mistake, and that the trustees of the Liverpool Docks were out of that fund to defray all expenses incident by law to the existence of the docks, and, as such, poor rates. We * think on the same principle they are at *708 liberty to apply the fund to the discharge of the liabilities which in execution of the Act, by keeping open the docks and

¹ 5 Best & S. 440, 4 N. R. (1864) 354.

² 11 H. L. Cas. 443.

³ 7 B. & C. 61.

warehouses, they must from time to time incur to their customers.

It was pointed out in the course of Mr. Mellish's argument, that the effect of applying the revenue of the trustees of the Liverpool Docks to the payment of such a liability as the present, would be to postpone the time at which the rates would be reduced, and that consequently the ultimate loss would fall on those who were payers of the rates at the time when the rates, but for this liability, would have been reduced, and so that, in the possible, but not very probable, event of the plaintiffs being then still persons using the docks, the loss would partly fall upon the plaintiffs themselves. But we are unable to see how that affects the question whether the action would lie or not. A shareholder in an incorporated company, such as a railway company or an ordinary dock company, who has a cause of action against the corporation, does in effect, by obtaining redress, diminish the future dividends of the shareholders, including his own. In this respect, his position is analogous to that of the ratepayer, yet it never can be contended that a shareholder in an incorporated dock company could not maintain an action for an injury to his ship from the neglect of the company.

It was pointed out by Sir Hugh Cairns, in the course of his argument at your Lordships' bar, that the Legislature in the 6 Geo. 4, c. 187, §§ 130-136, showed a clear intention that the funds of the dock trust might, in some cases at least, be applied by the committee to indemnifying parties who had suffered by the negligence of the servants of the trustees of the Liverpool Docks;

and also that damages recovered against the trustees of
 *709 * the Liverpool Docks might be levied out of the rates, by the circuitous and somewhat clumsy process of distraining on the goods of the treasurer, who was to repay himself out of the rates. And these enactments, so far as they go, seem to us to show that the Legislature at least did not intend to take away any liability of the trustees which would otherwise have been cast on them by the general law, though we should not willingly infer from them that it was intended to impose any liability beyond that which would be imposed by the general law.

Mr. Mellish also founded an argument on the wording of these sections, taken in conjunction with the enactments in the second clause of 51 Geo. 3, c. 143, and the second, third, and fourth

clauses of the 13 & 14 Vict. c. 64, which it is proper we should now notice.

The trustees of the Liverpool Docks were required by the second section of 51 Geo. 3, c. 143, to appoint a committee of their body, and all their powers were to be exercised by that committee, except in so far as the trustees of the docks might reserve any question for their own determination. By the subsequent enactments, this committee was to consist partly of the members of the trustees of the Liverpool Docks and partly of members elected by the persons who had paid dock rates; and the whole of the powers of the trustees of the Liverpool Docks were to be exercised exclusively by this committee so constituted.

When the demurrer in the case of *Gibbs v. The Trustees of the Liverpool Docks* was argued in the Court of Exchequer, that Court gave judgment upon the ground that the action, if it lay at all, lay against the committee, and not against the trustees of the Liverpool Docks.¹ But in the Court of Error the defendants, * by their counsel, very handsomely agreed that the plain- * 710 tiff should not be put to the expense and trouble of issuing another writ against the committee; but that, if the action would lie against either body, judgment might be given against the defendants on the record. Subsequent legislation has done away with the committee, and the question whether the writ ought in such a case to have been directed against the one body or the other can never in future arise.

Your Lordships will probably agree with the Court of Exchequer Chamber, that this arrangement was one which ought not to be disturbed by the Court; and there has been no attempt on the part of the counsel for the Mersey Board (who now represent both the original defendants and the committee) to depart from this agreement.

But Mr. Mellish argued that the whole scheme of the Legislature showed that the intention of the Legislature was to give to the committee an uncontrolled discretionary power to compensate such persons as in their opinion ought to be compensated, and no others. He did not say that the committee was to exercise this power capriciously, but quasi-judicially, though without appeal; and he argued that the change of the constitution of the committee, by which one half was to be elected by the ratepayers (though only

¹ 1 H. & N. 439.

introduced by the later Acts), rendered this less unlikely. But we do not think that such is the fair construction to be put on the enactments.

It is contrary to the general rule of law, not only in this country but in every other, to make a person judge in his own cause; and though the Legislature can, and no doubt in a proper case would, depart from that general rule, an intention to do so

*711 is not to be inferred * except from much clearer enactments than any to be found in these statutes.

We have gone through these enactments, and we think your Lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these Acts. As we have already intimated, in our opinion the proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the trustees. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon broader grounds, which, if we do not mistake them, were in effect two.

They said that by the general law of this country, bodies such as the present are trustees for public purposes, and that being such, they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation, or, at all events, that the duty of such corporations was limited to that of exercising due care in the choice of their officers, and that if they had properly selected their officers, any evil which ensued must be the fault of the officer, and that redress for it must be sought against him alone.

A great many cases were cited at your Lordships' bar as supporting this position, many of which are really not applicable *712 to such a case as the present: *Lane v. * Cotton*; ¹ *Whitfield v. Le Despencer*, ² the case of the Postmaster-General; and *Nicholson v. Mounsey*, ³ the case of the captain of the man-of-war, are authorities that where a person is a public officer in the

¹ 1 Ld. Raym. 646.

² Cowp. 754.

³ 15 East, 384.

sense that he is a servant of the Government, and as such has the management of some branch of the Government business, he is not responsible for any negligence or default of those in the same employment as himself.

But these cases were decided upon the ground that the Government was the principal, and the defendant merely the servant. If an action were brought by the owner of goods against the manager of the goods traffic of a railway company for some injury sustained on the line, it would fail unless it could be shown that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal or against the immediate actors in the wrong.¹ And all that is decided by this class of cases is, that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal (the public) cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals (the inhabitants of the parish). But the defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your Lordships' House in *Jones v. Mersey Board*, where they were held to be rateable as occupiers of the docks on * the very ground that they did not *713 occupy as servants of the public or Government.

Another class of cases also cited depends upon the following principle: If the Legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorising the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorised for a public purpose or for private profit. No action will lie against railway companies for erecting a line of railway authorised by their Acts, so long as they pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their

¹ Story on Agency, § 313.

Acts; though the one road is made for the profit of the shareholders in the company and the other is not. The principle is that the Act is not wrongful, not because it is for a public purpose, but because it is authorised by the Legislature (see *The King v. Pease*.¹) This we think is the point decided in *The Governors of the British Cast Plate Manufacturers v. Meredith*; ² *Sutton v. Clarke*; ³ and several other cases, as is well explained by Mr. Justice Williams in *Whitehouse v. Fellowes*.⁴

But though the Legislature has authorised the execution of the works, it does not thereby exempt those authorised to make
 * 714 them from the obligation to use * reasonable care that in making them no unnecessary damage shall be done. In *Brine v. The Great Western Railway Company*,⁵ Mr. Justice Crompton says, "the distinction is now clearly established between damage from works authorised by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains."

This distinction is as applicable to works executed for one purpose as for another. This principle seems to have been that acted upon in *Leader v. Moxon*,⁶ and it is to some extent recognised in *Sutton v. Clarke*,⁷ by Chief Justice Gibbs, who puts the judgment on the ground that the defendant, in the execution of a duty imposed on him by the Legislature, had exercised his best skill, diligence and caution in the execution of it. "We are of opinion," says Chief Justice Gibbs, "that he is not liable for an injury which he did not only not foresee, but could not foresee. He has done all that is incumbent on him, having used his best skill and diligence." This certainly implies that, in the opinion of those who concurred in that judgment, the defendant would have been liable if he had neglected to use his best skill and diligence.

In the subsequent case of *Jones v. Bird*,⁸ Justice Bayley laid down a stricter rule. He said that the defendants, who in that case were the persons who actually made a sewer authorised by statute, were not protected merely because acting *bonâ fide* and to the best of their skill and judgment. "That," says he, "is not

¹ 4 B. & Ad. 30.

² 4 T. B. 794.

³ 6 Taunt. 29.

⁴ 10 C. B. N. S. 779.

⁵ 2 Best & S. 402, 411.

⁶ 3 Wils. 461, 2 W. Bl. 924.

⁷ 6 Taunt. 29.

⁸ 5 B. & Ald. 837.

enough ; they are bound to conduct themselves in a skilful *manner, and the question was most properly left to the jury *715 to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case." And there is a considerable number of cases, to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works, under the authority of statutes, for the improper mode in which their powers have been exercised, though the defendants did not derive any profit from the execution of the works.

There are, however, authorities that bear the other way upon this part of the case ; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your Lordships then to decide on which side the preponderance of authority lies. Those in favour of the defendant are *Hall v. Smith*,¹ *Duncan v. Findlater*,² *Holliday v. St. Leonard's, Shoreditch*,³ and *Metcalf v. Hetherington*.⁴

It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work.

This distinction is well stated in *Pickard v. Smith*,⁵ by Mr. Justice Williams, who says, "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself, or his servant or servants, in the course of his or their employment ; consequently, if an independent contractor is employed to do *a lawful act, and in the course of the *716 work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do ; and, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." "If the performance of the duty be omitted, the fact of his having in-

¹ 2 Bing. 156.

² 6 Clark & F. 394.

³ 11 C. B. N. S. 192.

⁴ 11 Exch. 257.

⁵ 10 C. B. N. S. 480.

trusted it to a person who also neglected it, furnishes no excuse either in good sense or law."

Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman v. Burnett*,¹ where Mr. Baron Parke says, "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist."

In such a case as the present, the liability does not de-
 * 717 pend on that relation. Liability for doing an improper * act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not.

Now, in *Hall v. Smith*,² the action was brought against the commissioners for paving Birmingham (sued by their clerk), Norton, a surveyor, and Kimberley, a contractor, employed by them to make a sewer, for leaving a quantity of rubbish unguarded and unlighted, whereby the plaintiff was thrown down and injured. The commissioners were authorised by an Act of Parliament to order the making of the sewer. "No negligence," says Lord Chief Justice Best, "was imputed to the commissioners themselves; they had ordered the tunnel to be made, and left the making of it to the defendants, Norton and Kimberley, the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the plaintiff from these persons not putting up rails, and not having lights during the night." The close of his judgment is, that "No action can be maintained

¹ 6 M. & W. 509.

² 2 Bing. 156.

against a man acting gratuitously for the public for the consequence of any act which he is authorised to do, and which, so far as he is concerned, is done with due care and attention; and that such a person is not answerable for the negligent execution of an order properly given."

This, no doubt, is true; but it would be equally true if the defendants, instead of being a body acting gratuitously for the public, had been a body like railway directors authorised to make the tunnel for their own *profit. No action could *718 have lain against them unless they stood in the relation of master to the parties actually guilty of negligence. This was not noticed by Chief Justice Best, as is pointed out in *Scott v. Mayor, &c. of Manchester*.¹ There, Mr. Baron Alderson says, "*Hall v. Smith* goes too far; the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants." "But," he adds, "*Hall v. Smith* was rightly decided upon the facts."

But though what Chief Justice Best said, in *Hall v. Smith*, was irrelevant, and therefore of less weight, still his opinion is an authority in favour of the defendants. It is, however, based upon a ground quite inapplicable to the present, or indeed to any modern case. He points out clearly and forcibly that it is harsh and impolitic to cast on individuals, gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the Legislature to exempt the private means of commissioners from liability, either, as in the present series of acts, by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of Chief Justice Best's reasoning fails, and *debile fundamentum fallit opus*.

*Duncan v. Findlater*² was a Scotch appeal brought before the House of Lords on a bill of exceptions. The action was against the trustees of a turnpike road, to recover damages for an injury sustained by the plaintiff from falling over a heap of stones negligently left on the *road. It was stated on the bill of *719 exceptions that the trustees had given directions, through their surveyor, that a drain should be filled up, and that the work-

¹ 1 H. & N. 59.

² 6 Clark & F. 894.

men engaged in filling up the drain left negligently the stones in the road. Assuming that the law of Scotland and that of England are the same, it is clear that no one could be answerable for this sort of negligence, unless he stood to those who actually were guilty of the negligence in the relation of master and servant. The Judge who presided at the trial took a different view of the law of Scotland, and directed the jury "that road trustees on a public road are liable for any injury which may happen to passengers, in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees." And to this direction there was an exception. If the body authorising the operation had been a railway company, or a private individual, instead of being trustees of a turnpike road, this direction would, according to English law, have been wrong; and this is pointed out by Lord Brougham, who says, "The rule of liability and its reason I take to be this: I am liable for what is done by me and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this: that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it"; language which is very similar to that already cited from *Quarman v. Burnett*.

But though all that really was decided in that case was that the trustees were not liable for the negligence of persons in
 * 720 their employment, who were not shown to be * their servants, it is not to be disputed that Lord Cottenham's language goes a great deal further, and shows that, in his opinion, persons incorporated for the purpose of executing works, could never, in their official or corporate capacity, be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is, "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it. And this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute,

either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?" Lord Cottenham is there speaking of a body of trustees acting under the Scotch Turnpike Act, but his reasoning is general. And the dilemma, if a good one, is applicable to all cases. This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case; but not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority.

It is pointed out by Lord Campbell, in *The Southampton and Itchin Bridge Company v. The Southampton Local Board of Health*,¹ that in every case the liability * of a body created * 721 by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statute is, that a duty is cast upon the incorporated body, not only to make the works authorised, but also to take proper care, and use reasonable skill, that the works are such as the statute authorises, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them, there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute.

Accordingly the Court of Queen's Bench, in *Ward v. Lee*,² and the Court of Common Pleas, in *Clothier v. Webster*,³ expressed an opinion that an action lay against a local board of health in its corporate capacity, for an injury sustained from making improper works. And in *The Southampton and Itchin Bridge Company v. The Southampton Local Board*, the point was expressly decided. And this decision was followed and approved of by the Court of Exchequer, in *Ruck v. Williams*,⁴ where it was held that an action would lie against the Improvement Commissioners of Cheltenham (sued by their clerk), for the improper mode in

¹ 8 Ellis & B. 801, 812.

² 12 C. B. N. S. 798.

³ 7 Ellis & B. 426.

⁴ 3 H. & N. 808.

which they caused a sewer to be made; and Mr. Baron Bramwell forcibly observed, "I can well understand if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible * for it. I can also understand that if one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable. But where commissioners who are a quasi-corporate body, are not affected (i. e. personally) by the result of an action, inasmuch as they are authorised by Act of Parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers from an act *bond fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

In *Whitehouse v. Fellows*,¹ the Court of Common Pleas decided that an action lay against the trustees of a turnpike road, sued in their quasi-corporate capacity by their clerk, for negligence in the manner in which they had caused drains to be made. This decision, it is hardly necessary to point out, though quite consistent with all that was decided by the House of Lords in *Duncan v. Findlater*, is directly opposed to the opinion of Lord Cottenham.

And lastly, in *Brownlow v. Metropolitan Board*,² it was decided that an action lay against the Metropolitan Board for the injury sustained by a shipowner, for the improper construction of a sewer in the bed of the Thames. And this decision was affirmed by the Court of Exchequer Chamber.³

It must rest with your Lordships to say whether those decisions to which we have referred are to be overruled. We think they are not consistent with Lord Cottenham's opinion.

*728 * Before leaving this part of the subject, we ought to call your Lordships' attention more particularly to the case of *Holliday v. St. Leonard's, Shoreditch*.⁴ The point actually decided there was, that there is an exception from the general law making a master liable for the negligence of his servant, where the servant is employed by a public body. The Judges of the Court of Common Pleas did not intend to decide any thing incon-

¹ 10 C. B. N. S. 765.

² 16 C. B. N. S. 546.

³ 18 C. B. N. S. 768.

⁴ 11 C. B. N. S. 192.

sistent with the decisions of the Court of Exchequer Chamber now at your Lordships' bar, or with their own decision in *Whitehouse v. Fellowes*.¹ And the point which they did decide does not arise in the present case, so that it is unnecessary directly to decide any thing upon it. But we think that we ought to call your Lordships' attention to the case, as much of what was said in the course of the judgment by Lord Chief Justice Erle is based upon the opinion of Lord Cottenham in *Duncan v. Findlater*, and is therefore an authority making against the view we have submitted to your Lordships.

There remains only one further point to consider. The Acts under which the Liverpool Docks have been made contain, as has been already mentioned, clauses enabling the trustees of the docks to appoint water-bailiffs and harbour masters, and confer on those officers powers of regulating the manner in which vessels shall enter the docks, &c. It was argued that the effect of these clauses was to confine the duty of the trustees to that of selecting proper officers, and that they could not be responsible further.

The case of *Metcalfe v. Hetherington*² was cited as *an authority for this position, and we think it is a de- *724 cision much in point. The Court of Exchequer there, in construing the Maryport Harbour Act, attributed this effect to enactments not very dissimilar to those now in question, and we agree, if this was so, the consequence would follow that the plaintiffs' remedy would be, not against those who appointed the officer, but only against the officer himself. But we cannot agree in so construing the present Acts. As has been already pointed out, clauses almost identical with those now in question are inserted in every harbour and dock Act, whether the docks be, as in the present case, the property of public commissioners or of a trading company. And we cannot think that it was the intention of the Legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the St. Catherine's Dock Company, for instance, of all recourse against it, and to substitute the personal liability of a harbour master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small percentage of the damages, when there are any.

If these enactments are in the present case so construed as to

¹ 10 C. B. N. S. 765.

² 11 Exch. 257.

relieve the Mersey Board from liability, the corresponding enactments in "The Harbours, Piers, and Docks Clauses Act, 1847," must also be so construed as to relieve all trading dock companies from liability; and that we think a *reductio ad absurdum*. This was not brought to the notice of the Court of Exchequer when deciding *Metcalf v. Hetherington*. With the greatest respect for those who joined in that decision, we think it was erroneous.

For these reasons, we answer both your Lordships' *725 * questions in each of these cases in the affirmative, that is, in favour of the plaintiffs below, the respondents in error.

June 5.

THE LORD CHANCELLOR (LORD CRANWORTH.) — My Lords, these are two appeals depending very much on the same principles as those which led to the decision of your Lordships' House last year, in the case of *The Mersey Docks and Harbour Board v. Cameron*.¹ The question there, was whether the trustees of the docks and harbour, who are a body having no beneficial interest in the tolls and other produce of the docks, were rateable to the relief of the poor. The argument was, that they, as a public body not receiving tolls for their own benefit, were not liable; but your Lordships, after a long argument, decided that they were.

The question in the present two cases is different. Both cases arise out of one transaction. A ship called the "Sierra Nevada," in entering or endeavouring to enter, one of the docks, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the appellants, one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Exchequer Chamber held that the appellants were liable. In both cases they have appealed. And the ground of appeal is, that they are not a mere company deriving benefit, like a railway company, from the traffic, but a public body of trustees, constituted by the Legislature for the purpose of maintaining the docks, and for *726 that purpose having authority to collect tolls, to * be applied in the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public.

¹ Ante, 443.

In the case of Gibbs it must be taken as admitted by the appellants, that knowing that the dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, they did not take reasonable care to put the same "into a fit state for that purpose"; whereupon the "*Sierra Nevada*," in endeavouring to enter into the dock, struck against the mud, and the cargo thereby became damaged. In the other case (which did not arise upon a demurrer) it must be taken as an established fact that the appellants had by their servants the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that if the appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud-bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgment of the House in the one case must also decide it in the other: and the question therefore is, What are the principles which regulate the liabilities of such a body as that of the Mersey Docks and Harbour Board?

Where such a body of trustees is constituted by statute, having the right to levy tolls for their own profit, in consideration of making and maintaining a dock or a canal, there is no doubt of their liability to make good to the persons using the dock or canal, any damage occasioned by their neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the *decision was affirmed in the Court of *727 Error, in the case of *Parnaby v. The Lancaster Canal Company*.¹ The ground on which the Court of Error rested the decision in that case, is stated by Chief Justice Tindal to have been, that the defendants there, who constituted a company, made the canal for their profit, and opened it to the public upon the payment of tolls; and the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.

The only difference between that case and those now standing for decision by your Lordships is, that here the appellants, in whom the docks are vested, do not collect tolls for their own prof-

¹ 11 A. & E. 223.

it, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference in principle in respect to their liability. It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by which the docks are managed.

It is impossible to argue, after the decision of this House in the case of *The Mersey Docks and Harbour Board v. Cameron*, that the appellants are not in the occupation of the docks. They are as much the occupiers of them, as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with * that of *Parnaby v. The Lancaster Canal Company*, must govern this case. The appellants are the occupiers of the docks entitled to levy tolls from those who use the docks; and so are liable to the same responsibilities as would attach on them if they were the absolute owners occupying and using them for their own profit.

It cannot be denied that there have been dicta, and perhaps decisions, not capable of being reconciled with the result at which I have arrived. But all these authorities have been so fully brought under review, in the very able and elaborate opinion of the learned Judges delivered by Mr. Justice Blackburn in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion.

I content myself, therefore, with moving your Lordships to give judgment, in each of these cases, for the defendant in error.

LORD WENSLEYDALE. — My Lords, the Court of Exchequer Chamber, in both these cases, founded its judgment on that of the Exchequer Chamber in the case of *Parnaby v. The Lancaster Canal Company*,¹ in which case there was a company incorporated by Act of Parliament for the purpose of maintaining a canal, to be opened for the use of the public on payment of rates which the Canal Company might receive for its own benefit (that is, the pref-

¹ 11 A. & E. 230.

its were to be divided amongst the shareholders); and the Court held that the common law imposed a duty on the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so * long as they * 729 kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property.

Of the propriety of this decision there could be no doubt, where the profits were received for the benefit of the company. In the present case the Dock Trustees do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all the subjects of the realm, that is, to maintain the docks for the use of any who choose to frequent them, and to pay the debt incurred in their construction; and the Court decided that there was no difference between that case and the present.

If this question were *res integra*, not settled by the authority of decisions, I am strongly inclined to think that this decision of the Court could not be supported. It would appear to me that this case falls within the principle of those cases which have decided that when a person is acting as a public officer on behalf of Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. This was the principle of the decision in *Lane v. Cotton*,¹ and *Whitfield v. Le Despencer*,² and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them.

Thus the Postmaster General, who has the management of one department of the public service, the duly receiving and conveying and delivering letters from and to different places, which is eminently beneficial to the * whole community, and causes * 730 profit to the Government, is not responsible for any of the servants of the Post Office Department, though he might appoint or dismiss them; and whether the Postmaster General be one individual, as he is now, or two persons fill the one office, as in the case of *Whitfield v. Lord Le Despencer*, or if more, however numerous, or the Crown were to make a corporate body for the regulation and government of the Post Office, neither individuals nor a

¹ 1 Ld. Raym. 646.

² Cowp. 754.

corporate body would be responsible for the neglect of their servants. In this case, if there had been a Portmaster General for all the ports of England, to take care that the receipt and discharge of goods, and the repairs of ships should be easy and convenient, and the receipt of custom duties convenient; or suppose his duties to be limited to a certain number of ports, or suppose a corporation were appointed instead of an individual, would it cause that corporation to be responsible for the defects of its officers, by whom alone it acted in the management of the docks, and in the due discharge of its duties towards the public on whose behalf it was acting?

If we had now only to review a great number of cases connected with this subject, decided in different Courts, many contradictory and many very unsatisfactory, I should be disposed to abide by the decision of the case of *Metcalf v. Hetherington*,¹ where the trustees and managers of the harbour were held not to be responsible for the defaults of the persons actually employed in conducting the business of the harbour.

If this case depended only on the decision of the Courts below, I should feel great difficulty indeed in supporting the decision of the Court of Exchequer * Chamber. But I cannot help thinking that the decisions of your Lordships' House, which are no doubt binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the appellants are responsible. In the case of the *Mersey Docks and Harbour Board Trustees v. Cameron*, and *Jones v. Mersey Docks and Harbour Board Trustees*, in July, 1864,² your Lordships, upon a full review and consideration, after a difference of opinion between the consulted Judges, decided that the appellants, the Mersey Dock and Harbour Board Trustees, were liable to be rated as occupiers, though they occupied those docks for the purposes of those who frequented the port, and derived no benefit from the occupation; and that they did not occupy for public purposes in such a sense as to exempt them from liability to poor rates.

It seems to follow, therefore, that they were not considered as being on the same footing as occupiers of public buildings for post office or other Government purposes, but were liable as mere private individuals; and if so, it is difficult to say that they were act-

¹ 11 Exch. 257.

² Ante, 443.

ing on behalf of the public for the public benefit, and therefore were irresponsible for the neglect and defaults of their servants, by whom alone they could act. Whether they were acting for the benefit of the public or not seems to be decided by that case.

As we are bound by your Lordships' decision, the opinion of the learned Judges, delivered by Mr. Justice Blackburn, must be considered as correct, and therefore ought to be affirmed.

LORD WESTBURY. — My Lords, I entirely concur in the conclusion derived * from the authorities and from the * 732 principles of law laid down in the very able opinion delivered to your Lordships by Mr. Justice Blackburn. I concur also in the observations of my noble and learned friend on the Woolsack ; and think that judgment ought to be given for the defendants in error.

But I think it desirable to say a few words with reference to the difficulty felt by the learned Judges, in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan v. Findlater*.¹ I can well divine what was at that time passing in the mind of Lord Cottenham. He seems to have thought that, if persons constituting a corporation are trustees of property for the direct benefit of certain individuals, and there is no other than corporate property, and if in their capacity as trustees an act is done, by order of the corporation, which amounts to a tort, or trespass, and gives a right of action and a right to damages to any private individual, a Court of equity would not permit an execution to issue, on any judgment that might be recovered, against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and that the corporators as trustees have no interest therein. But, my Lords, I apprehend that that was a misapprehension on the part of the noble and learned Lord, and that it would lead to very mischievous consequences. It is by no means true that a Court of equity is able to protect the property of beneficiaries against the act of trustees. If trustees alienate property for valuable consideration to a person who pays that consideration, without notice of the trust, the interest of the beneficiaries suffers from that act ; and it would be a very unreasonable and a * very mis- * 733 chievous thing if, in the case of a corporation dealing with

¹ 6 Clark & F. 894.

the public or with individuals, such corporation, should by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting, for a remedy, against the body doing or authorising those acts, and should be driven to seek a remedy against the individual corporators whose decision or order, in the name of the corporation, may have led to the mischief complained of. It is much more reasonable, in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint, and his title to relief against the individual corporators who have wrongfully used the name of the corporation.

My Lords, the learned Judges observed, and with very great correctness, that it is not everything that falls from a noble and learned Lord in advising the House which is to be considered as the opinion of the House. Those observations of Lord Cottenham, which directly tend to this conclusion, — that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done, — would, if they were recognized as the law, undoubtedly lead to very great evil and injury.

My Lords, I confine my observations to the case of a remedy sought for a wrongful act, because your Lordships are very well aware that the rule has been well established that if, in the case of a contract entered into with a corporation created by *784 Act of Parliament, the * contract is made by the corporation *ultra vires* of the corporation, the party may not be entitled to recover under that contract. That may be a very convenient rule, and it is not at all affected by the considerations we are now dealing with. But with regard to the observations attributed to the noble and learned Chancellor Lord Cottenham, I conceive that they ought not to be taken or regarded as establishing any rule that at all interferes with the decision at which your Lordships have arrived in the case now before you.

With regard to what has been suggested by my noble and learned friend (Lord Wensleydale), that it would be a more correct principle to hold officers of public departments not to be answerable for inferior servants; that may be quite correct where

an officer fulfilling a public duty is directly appointed by the Crown, and is acting as the servant of the Crown ; but it has no application to the case of trustees incorporated for the purpose of public works, and standing in relation to the public in the way these trustees do in the present case. I concur therefore in the motion of my noble and learned friend.

Judgment for defendants in error.

Lords' Journals, 5th June, 1866.

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A testator, after making specific devises of his property real and personal, thus provided for the disposal of his residuary estate: "As to all the residue, &c. not hereinbefore specifically bequeathed, I give, &c. to my executors, their heirs, &c. upon the trusts following," to pay debts and legacies, to permit his nephew, H. B. C., to receive the rents for life, and "after the death of my said nephew, provided he shall leave any child or children him surviving, &c., I direct that my executors, &c. shall stand seised of my said residuary estate upon trust for such persons and for such ends and purposes as my said nephew shall by his last will direct, appoint, or devise; but if my said nephew shall die without leaving any child or children him surviving, &c., and my said nephew shall not previous to his decease make any such appointment as aforesaid, then my executors shall stand possessed of my said residuary estate, &c. upon trust for B. Y. and R., their heirs, &c." The nephew died without ever having had a child, leaving a will in which he recited his uncle's will, and, declaring himself thereby entitled to appoint, he appointed the residue to E. and J.:—

* *Held*, affirming the decision of the Master of the Rolls, that the nephew * 736 never having had a child, the condition on which the power to appoint was founded had not occurred, and the power to appoint never came into existence; that the nephew's appointment was therefore invalid; and the residuary estate went, under the uncle's will, to B. Y. and R. — *Earle v. Barker*, 280.

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The 8th part of the "Companies Act, 1862" (25 & 26 Vict. c. 89) includes and applies to all companies which had been registered other than (as well as) companies registered under that Act itself. "Registered companies" there means registered under that Act itself; "unregistered companies" all those which had been registered under other Acts antecedently to its passing. Therefore, an insurance company which was formed in 1852, and registered under the Act of 1844 (7 & 8 Vict. c. 110), and which ceased to carry on business in 1855, was held to be capable of being made the subject of a winding-up order under the 25 & 26 Vict. c. 89. — *Bower v. Hope Insurance Company*, 389.

COMPENSATION. See ELECTION. FISHERY.

CONDITION. See APPOINTMENT. POWER.

What is or is not a condition precedent, depends, not on merely technical words, but on the plain intention of the parties, to be deduced from the whole instrument.

A. entered into a contract with B., by which A. was "forthwith" to bring a vessel alongside a particular wharf, and within seven days of his doing so, B. was to pay a sum of 1000*l.*; a further sum of 2000*l.* in twenty-one days afterwards; and another sum of 2000*l.* on the ship arriving at the Nore. Certain penalties were to be payable by A. for non-performance of specified acts. There were several other stipulations, * and after all 'came a covenant by which "for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties which he might incur under these presents, A. and two responsible sureties were 'within ten days from the execution of these presents,' to execute a bond to B. in the penal sum of 5000*l.*" There was a covenant in exactly similar terms on the part of B. The giving of the bonds was not to prejudice their mutual rights and liabilities under the agreement:—

Held, that the covenant to give the bonds was a condition precedent, so that on B.'s refusal to allow A. to ship the cable, A., who had not given his bond, could not maintain an action for damages in respect of such refusal. — *Roberts v. Brett*, 337.

The covenants to give the bonds were not mutual and dependent; the fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract. — *Id.*

"Forthwith," in this contract, meant a reasonable time. — *Id.*

If the ship had been brought alongside on the day after the execution of the contract, and if the 1000*l.* had thereon been paid, A. would not have been thereby exempted from the obligation to give his bond within the ten days. — *Id.*

CONNIVANCE. See DIVORCE.

CORPORATE BODY. See DAMAGES. POOR RATE.

CROWN PROPERTY. See POOR RATE.

The Crown not being named in the 43 Eliz. c. 2, is not bound by its enactments. Property therefore in the occupation of the Crown, or in that of

persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor. — *Mersey Docks v. Cameron. Gibbs v. Mersey Docks*, 443.

COSTS. See JUDGMENT. PRACTICE. WINDING UP.

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DAMAGES.

Persons who have a duty to perform, and who may be made responsible for injuries if they know, but do not remedy, causes of mischief which may occasion them, are equally responsible if they negligently remain ignorant of those causes of mischief, and so leave them unremedied. — *Mersey Docks Trustees v. Gibbs*, 686.

A private person, or a company, having a right to levy tolls in * respect * 788 of the performance of a particular work, will be liable in damages for injuries occasioned by performing it improperly. *Parnaby v. The Lancaster Canal Company* (11 A. & E. 228) approved of. — *Id.*

A corporate body authorised to perform such a work, and receiving tolls in respect of it, though obtaining no profit itself from such tolls, but collecting them for the maintenance of the work and the future possible benefit of the public, is equally liable for injuries arising from the improper performance of such work, and the funds thus obtained must discharge that liability. — *Id.*

Per LORD WESTBURY. — Trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust. — *Id.*

Per LORD WESTBURY. — Some of the observations of Lord Cottenham in *Duncan v. Findlater* (6 Clark & F. 894), commented on and controverted. — *Id.*

Metcalfe v. Heitherington (11 Exch. 257; 5 H. & N. 719) discussed.

DELAY. See ELECTION. TENANCY ACT.

DEMESNE LANDS. See MANOR.

DEMISE OF MANOR LANDS. See MANOR.

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DIRECTION TO JURY. See NUISANCE.

A. bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were the works of a Copper Smelting Company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works, when they were in operation, were proved to be injurious to the trees on A.'s estate. At the trial the judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbour; but that the law did not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapours from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property, that locality, and all other circumstances must be taken into consideration, * and that in * 739 counties where great works had been and were carried on, parties must not stand on extreme rights.

Held, that the direction was right. — *St. Helen's Smoking Company v. Tipping*, 642.

DISCLAIMER. See PATENT.

DIVORCE.

The word "conniving," in the 29th section of the 20 & 21 Vict. c. 85, means not merely refusing to see an act of adultery, but also wilfully abstaining from taking any step to prevent adulterous intercourse, which, from what passes before the husband's eyes, he must reasonably expect will occur. — *Gipps v. Gipps*, 1.

So if he takes money from the adulterer not to complain of the wrong, but to abandon his legal remedy for it, and then leaves the wife in a situation likely to occasion a renewal of the adulterous intercourse with the same person, he is "accessory" to it. — *Id.*

Therefore, where A. presented a petition for a divorce in respect of the wife's adultery with B., and received from B. a sum of money not to include in the petition a prayer for damages, and afterwards, on receiving a promise from B. to execute a bond to pay a further sum, offered no evidence in support of his petition, and allowed a verdict to be given for the respondent and co-respondent, and the petition to be dismissed, but made no provision for his wife, nor took any precaution to protect her against future intercourse with B., it was *Held*, that his conduct was such as to bring him within the words of the statute, so that his fresh petition in respect of renewed acts of adultery, occurring after the compromise, was properly dismissed. (*Diss.* Lord Wensleydale.) — *Id.*

Quære. Whether the word "adultery" in the 31st section of the 20 & 21 Vict. c. 85, is confined to the adultery alleged in the petition for the dissolution of marriage. Per LORD WESTBURY, Lord Chancellor. — It is not, — so that if A. has connived at the adultery of his wife with B., he cannot obtain a divorce on account of her adultery with C. — *Id.*

A husband cannot obtain a divorce in respect of an act of adultery committed with a particular person at one time, if at a previous time he has connived at her adultery with the same person. — *Id.*

* 740 * Per LORD WENSLEYDALE and LORD CHELMSFORD. — To constitute connivance there must be a corrupt intention. The first arrangement in this case did not, in itself, amount to connivance, and did not bar the remedy in respect of a fresh act of adultery. — *Id.*

Per LORD CHELMSFORD. — Renewed adultery with the same person is not a fresh act of adultery, but merely further evidence of the adultery. — *Id.*

Per LORD WENSLEYDALE. — A covenant to pay damages to a petitioner for a divorce on the ground of adultery, is altogether void as contrary to the policy of the 20 & 21 Vict. c. 85, § 33. — *Id.*

Per LORD WENSLEYDALE. — Where, by consent, a jury has been dispensed with on the trial of a petition for a divorce, if a new trial should be ordered, the consent previously given would no longer be binding, and the petitioner might demand to have his case tried before a jury. — *Id.*

Timmings v. Timmings, 3 Hagg. Eccl. 76, 81, observed upon. — *Id.*

DOCKS. See DAMAGES. POOR RATE.

EAST INDIA COMPANY. See FUND.

ELECTION.

The doctrine of election is not properly a rule of positive law, but a rule of practice in equity. The knowledge of it is not therefore to be imputed as a matter of legal obligation. — *Spread v. Morgan*, 588.

Where a case of election arises, the person who ought to make it must be shown to have known of his duty to do so, and must be proved to have done such acts as amounted to an election. — *Id.*

Remaining in possession of two estates, held under titles not consistent with each other, affords no decisive proof of that kind. The rule is, "that if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference, cannot be an election to take the one, and reject the other" (*Padbury v. Clark*, 2 M. & G. 298, confirmed). — *Id.*

Semble, per LORD CHELMSFORD. — A party having an equity to compel an election, does not forfeit that equity by delay in enforcing it. — *Id.*

* Per LORD CHELMSFORD. — An election gives a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made. — *Id.*

ESCHEAT. See MANOR.

ESTATE TAIL, CREATED BY IMPLICATION. See WILL, 1.

EVIDENCE. See FISHERY.

Evidence of mere immemorial usage will not support a claim of anchorage dues, claimed in respect of the use of the soil. — *Gann v. The Free Fishers of Whitstable*, 192.

EXECUTION OF POWER. See POWER, 1.

EXCISE.

The 6 & 7 Wm. 4, c. 38 (Ir.), § 3, did not repeal the previous statute, 6 Geo. 4, c. 81, § 2, and the schedule thereto, but all were to be read together. Therefore when the 3d section of the 6 & 7 Wm. 4, c. 38, was itself repealed, the provisions of the 6 Geo. 4, c. 81, still continued, and a person in Ireland, licensed to trade in grocery, and obtaining a spirit license, was liable to the larger duty charged by the earlier statute on a person of that description, as fixed by the schedule to the 2d section of that statute. — *Dickson v. The Queen*, 175.

FINES. See TENANTRY ACT.

FISHERY.

The bed of all tidal navigable rivers and of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, and the right to anchor is a necessary part of the right to navigate. This right never could have been interfered with by grant from the Crown. — *Gann v. The Free Fishers of Whitstable*, 192.

The grant therefore of an oyster-bed in an arm of the sea below low-water mark, must have been taken by the grantee, subject to the public right of

navigation; and he cannot now, in respect of his ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with the enjoyment of this public right. — *Id.*

- * 742 A claim of an anchorage due cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil * of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due. — *Id.*

Evidence of mere immemorial usage will not support such a claim. — *Id.*

A liability to make compensation for actual injury done to the oysters by anchoring is not to be confounded with a liability to toll for casting anchor in the soil itself. — *Id.*

The Mayor of Colchester v. Brooks, 7 Q. B. 389, observed upon. — *Id.*

FRAUD. See **POWER**, 1.

FUND. See **DAMAGES**.

A proposal was made to establish, by the subscription of individuals (if approved of and aided by the East India Company), a fund for the purpose of creating, at the end of a certain number of years' service, a retiring pension to be held by members of the East India Company's civil service in Bengal. The directors did approve of the proposal, and undertook to pay in every year a sum equal to that subscribed by the subscribing members. They suggested rules which were adopted, and in the course of the correspondence between the directors and the subscribers, it was settled, by order of the directors and consent of the subscribers, that a subscriber should pay a certain percentage on his salary during the whole time of his service, and that if, when he wished to retire, he had not paid half (the other half being contributed by the company) of the amount of the principal of the retiring pension (which was fixed at 10,000 rupees, or 1000*l.*) he must fully make up his half; but nothing was expressly declared as to what should be done with the excess, if his payments had exceeded the amount of the half:—

Held, affirming the judgments of the Courts below, that the subscriber was not entitled to have such excess refunded. — *Boldero v. The Directors of the East India Company*, 405.

GAME.

Title to property created merely by the act of reducing a thing into possession, necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore,

- * 743 effected by one who is at the moment * a trespasser, cannot create a title to property. — *Blades v. Higgs*, 621.

Game chased and killed on the land of A., is his property. — *Id.*

Therefore where a stranger, without A.'s permission, killed conies on the land of A., and immediately took them up and carried them away, and sold them to a third person, it was held that the servants of A. were justified in taking possession of them as being the property of A. — *Id.*

Rigg v. Lonsdale, 11 Exch. 654; 1 H. & N. 923, approved. Also *Sutton v. Moody*, 1 Ld. Raym. 259; Comyns, 34; 12 Mod. 144, 145. But per LORD CHELMSFORD, as to the declaration in the latter case that "If A. starts a

hare on the ground of B., and hunts it into the ground of C. and kills it there, the property is in A. the hunter": *Quære*. — *Id.*

GRANT OF A FISHERY. See FISHERY.

GROCERY. See EXCISE.

HUNTING. See GAME.

IMMEMORIAL USAGE. See FISHERY.

IMPLICATION. See WILL, 2.

INCUMBRANCER.

The assignment, to a trustee for the purchaser of an estate, of outstanding terms affecting it, and of judgments on which elegits had been issued, does not constitute the purchaser an incumbrancer within the meaning of the 42d section of the 3 & 4 Wm. 4, c. 27, so as to prevent the operation of the statute on the claim of the mortgagee:—

Held, therefore, reversing the judgment of the Court below, that the mortgagee was only entitled to demand six years' arrears of interest up to the filing of his petition in which the holder of the estates sold was, for the first time, made a party to the suit. — *Chinnery v. Evans*, 115.

INFRINGEMENT. See PATENT TRADE MARKS.

INJURIES. See DAMAGES.

IRELAND. See EXCISE. TENANTRY ACT.

JUDGMENT. See COMPANIES.

H., an insurance company, registered under the "Joint Stock Company's Act, 1845," granted a policy on a life. H. transferred its business and its liabilities to another company, M. The life fell; an action was brought against the H. Company. Several pleas were pleaded: a director and agent of the M. Company entered into a negotiation with the plaintiff and got the policy transferred to himself; the pleas were then withdrawn, * and * 744 judgment entered against the H. Company. The director then assigned the policy and judgment to B. as trustee for another person. Execution was issued, and a return of *nulla bona* made. B. then presented a petition for a winding-up order against the H. Company. The Master of the Rolls granted the order. The Lords Justices offered to B. the opportunity of going into evidence in support of his claim, which was alleged by the H. Company to be collusive; but he refused to do so, insisting that that company could not impeach it except by filing a bill to stay the judgment. On this refusal the Lords Justices discharged the order of the Master of the Rolls:—

Held, that the order of the Master of the Rolls could not be sustained, the H. Company being entitled to file a bill to impeach the judgment. But the petitioner was not bound, as a preliminary to his right to the order, to go into further evidence in support of his claim, for, there being a judgment in his favour, the burden of impeaching it lay on the company. The order of the Lords Justices was therefore reversed, and the petition was ordered to stand over until a fixed day, on the respondents undertaking to file a bill to impeach the judgment. — *Bowes v. The Hope Insurance Company*, 389.

The costs of the appeals to the Lords Justices and to the House were ordered to be costs in the cause. — *Id.*

LICENSE. See EXCISE. LIGHTS. LIGHTS.

The right to ancient lights now depends on statute (2 & 3 Wm. 4, c. 71), and so does not require, and ought not to be rested on, any prescription or fiction of a license. — *Tapling v. Jones*, 290.

Therefore, as the statute declares it to be absolute and indefeasible, it cannot be lost by a temporary intermission not amounting to abandonment, nor can it be forfeited by any attempt to extend the right. — *Id.*

"The right to obstruct a new light" is an unmeaning expression. The right is that of a man to use his own land, though his so using it may obstruct the light received through the window of an adjoining house. — *Id.*

Invasion of privacy by opening a window which overlooks another man's grounds, is not recognised by law as a wrongful act. — *Id.*

- 745 • The opening of a new window, being in itself an innocent act, cannot therefore destroy existing rights in one party, or give new, or revive old rights in another. — *Id.*

Consequently, where there was an ancient light, and then others were added, and an obstruction was raised against the added lights, which from their position could not be obstructed without obstructing the ancient light, such obstruction was illegal. — *Id.*

Renshaw v. Bean, 18 Q. B. 112, and *Hutchinson v. Copestake*, 8 C. B. N. S. 102, 9 C. B. N. S. 863, overruled. — *Id.*

LIMITATIONS, STATUTE OF. See ELECTION. INCUMBRANCER. RECEIVER.

MANOR.

The demesne lands of a manor previously granted in fee do not become reunited to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat. — *Delacherois v. Delacherois*, 62.

If the demesne lands of a manor are treated, in a conveyance of them in fee, as a distinct property, as, for instance, being conveyed by the lord in fee without being accompanied by a declaration of the feoffor's title as lord, or being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain. — *Id.*

On repurchase, by the lord, of the fee simple, he will hold them of the chief lord. — *Id.*

They will not, on such repurchase, again form part of the manor, so as to pass under that description made in a will dated anterior to the purchase. — *Id.*

In the reign of Charles I., a grant was made by patent to Viscount Montgomery of a manor to be held in fee and common socage, with power to create as many separate manors, and to appoint as many tenemental lands to each manor as the grantee should think fit, and also with license to grant in fee simple or for lesser estates any of the lands belonging to such manors, to be held thereof respectively by suit of Court, and such other services or rents as he, his heirs, &c. should think fit, *non obstante* the Statute *Quia Emptores*. This patent was validated and confirmed by

Acts of the Irish Parliament. The heir of the grantee, in the year 1721, *granted by indenture of lease and release to A., in fee farm, * 746 certain of the tenemental lands of the manor. They were described as "situate, lying, and being in the manor," and were to be held at a rent of 6*l.* suit and service to the manor, payment of small sums for leet money, and an obligation to grind corn at the manor mills; performance of each of which things was secured by covenant; and the grantor also reserved a power of distress:—

Held, that the lands thus granted out were severed from the manor. — *Id.*

In March, 1836, the owner of the manor executed a will devising "the manor" to the younger of his two nephews. In 1842 he purchased the tenemental lands which had been granted out in 1721. He died in October, 1850, without having altered or republished his will:—

Held, that these lands were not by the purchase reannexed to the manor so as to pass by the will, but devolved upon the testator's heir at law. — *Id.*

MANUFACTURES. See NUISANCE.

MISDIRECTION. See NUISANCE.

MORTGAGE.

Payment of interest on an Irish mortgage made by a receiver appointed under the 11 & 12 Geo. 3, c. 10 (Ir.), over the estates mortgaged, is, within the terms of the 40th section of 3 & 4 Wm. 4, c. 27, payment by "an agent" of the party liable. — *Chinnery v. Evans*, 115.

The words in the 40th section "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing of an acknowledgment. — *Id.*

M. was possessed of estates in three counties, Cork, Kerry, and Limerick. In 1776 he mortgaged them to F. The interest on the mortgage was not regularly paid, and, on a petition presented by F., under the 11 & 12 Geo. 3, c. 10 (Ir.), a receiver was appointed. In form, his appointment embraced the three estates; in fact, he never entered into possession of any but the Limerick estate, from which alone he took the money necessary to keep down the interest on the mortgage. M. afterwards (without any knowledge of the matter on the part of F.) sold the Cork and Kerry estates to C., and certain outstanding terms and judgments were assigned and conveyed to a trustee for C. to protect the title. After the lapse of nearly twenty years, since the last payment made by the * receiver, F. claimed to have a sale of all the estates included in * 747 the original mortgage, in order to cover arrears of interest:—

Held, affirming the judgment of the Court below, that the payment by the receiver out of the rents of the Limerick estate, was a payment which in law must be considered as made by the mortgagor in respect of the mortgage debt, and therefore prevented the Statute of Limitations operating as a bar to the demand as to any of the estates comprised in the mortgage. — *Id.*

The assignment to a trustee for the purchaser of an estate, of outstanding terms affecting it, and of judgments on which elegits had been issued, does not constitute the purchaser an encumbrancer within the meaning of the

42d section of the 3 & 4 Wm. 4, c. 27, so as to prevent the operation of the statute on the claim of the mortgagee : —

Held, therefore, reversing the judgment of the Court below, that the mortgagee was only entitled to demand six years' arrears of interest up to the filing of his petition, in which the holder of the estate was, for the first time, made a party to the suit. — *Id.*

MUTUAL COVENANTS.

A. entered into a contract with B., by which A. was "forthwith" to bring a vessel alongside a particular wharf, and within seven days of his doing so, B. was to pay a sum of 1000*l.*; a further sum of 2000*l.* in twenty-one days afterwards; and another sum of 2000*l.* on the ship arriving at the Nore. Certain penalties were to be payable by A. for non-performance of specified acts. There were several other stipulations, and after them came a covenant by which "for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties which he might incur under these presents, A. and two responsible sureties were 'within ten days from the execution of these presents,' to execute a bond to B. in the penal sum of 5000*l.*" There was a covenant in exactly similar terms on the part of B. The giving of the bond was not to prejudice their mutual rights and liabilities under the agreement : —

Held, that the covenants to give the bonds were not mutual and dependent; the fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract. — *Roberts v. Brett*, 337.

NAVIGATION. See FISHERY.

* 748 * NUISANCE.

There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and of the trades carried on around him; as to the former the same rule would not apply. — *St. Helen's Smelting Company v. Tipping*, 642.

Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighbourhood. — *Id.*

A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not within the meaning of the law, "a convenient" place. — *Id.*

A. bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works when they were in operation were proved to be injurious to the trees on A.'s estate. At the trial the judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbour; but that the law did not regard trifling inconven-

iences; everything must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapours from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property; that locality, and all other circumstances must be taken into consideration, and that in counties where great works have been and were carried on, parties must not stand on extreme rights:—

Held, that the direction was right. — *Id.*

OCCUPATION. See POOR RATE.

OYSTER BEDS. See FISHERY.

* PATENT.

* 749

The object of the 5 & 6 Wm. 4, c. 83, was only to permit a disclaimer to amend the specification of a patent, by removing from it something superfluous, but not to allow the introduction of that which would convert a description, in itself unintelligible or impracticable, into a practicable description of a useful invention. — *Ralston v. Smith*, 223.

The words "not being such a disclaimer as shall extend the exclusive right," do not mean in the ordinary sense of the word "extend," merely adding to or enlarging the original specification, but are also intended to describe, so confining and restricting its expressions as substantially to amount to a statement of something new. — *Id.*

It is not every useful discovery that can be made the subject of a patent, but the words "new manufacture," in the Statute 21 J. 1, c. 3, will comprehend not only a production, but the means of producing it. — *Id.*

R. took out a patent for "improvements in embossing and finishing woven fabrics, and in the machinery and apparatus employed therein." In his specification he said, "I employ a roller of metal, wood, or other suitable material, and groove, flute, engrave, mill, or otherwise indent upon it any desired design"; he caused this roller to revolve with a bowl at unequal velocities, moving the fabric transversely when fed into the machine, and by these means he proposed to calender or finish, and to emboss the fabric by one process instead of two, as then practised. He afterwards entered a "disclaimer," in which he disclaimed the words in the title, "and in the machinery or apparatus employed therein," disclaimed the word "wood" from the description of the roller, and restricted the grooves or flutes on the roller to those of a circular kind. Any other grooves would not only not produce the desired effect on the fabric, but would destroy it:—

Held, that the original specification read with the disclaimer did not describe any thing which could properly be the subject of a patent such as he had taken out. — *Id.*

Held, also, that the disclaimer here extended the exclusive right, and so had done what the statute did not intend to allow, and consequently was bad, and the patent could not be supported. — *Id.*

One object of the invention was to enable the operations of calendering and embossing to be done at one and the same * time. *Quere.* * 750 Whether looking at the facts of the case, the patent (supposing the specification and disclaimer had been correct) might not have been main-

tained if it had been taken out for a new mode of using the machinery and apparatus employed in embossing and finishing woven fabrics. — *Id.*

Where there are two things similar in form, used for a similar object, and capable of the same application, one of them having been long known to mechanics, the introduction of the other into use will not constitute a good ground for a patent. — *Harwood v. Great Northern Railway Company*, 654.

A slight difference in the mode of application is not sufficient for such a purpose; nor will it be sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied. — *Id.*

The use of "fishes" as supports was known, and the use of "fishes" made with a groove or recess in their outer surface, was also known. A person took out a patent, which he thus described: "My invention consists in forming a recess or groove in one or both sides of each fish, so as to reduce the quantity of metal at that part, and to be adapted to receive the square heads of the bolts, which are thus prevented from turning round when the nuts are screwed on." His claim was "for constructing fishes for connecting the rails of railways, with a groove adapted for receiving the ends of the bolts or rivets employed for securing such fishes; and the application of such fishes for connecting the ends of railways in manner hereinbefore described. The constructing of fish-joints for connecting the rails of railways with grooved fishes fitted to the sides of the rails, and secured to them by bolts or nuts, or rivets, and having projecting wings firmly secured to and resting upon the sleepers or bearers, so as to support the rails by their sides and upper flanges." It was proved that before the date of his patent, fish-joints had been used to connect and strengthen the rails of railways. In some cases the fishes were flat pieces of iron, with round holes for bolts, the heads of the bolts being held in their places by separate means. In others the extreme ends of the holes were made square and the bolt heads square, to put into them, and, in some, square recesses were made in the flat pieces of iron for the same purpose; but till the time of the patent, fishes for connecting the rails of railways had never

* 751 been made with a groove in their lateral surfaces so as to receive the square heads of the bolts, and render the fish lighter for equal strength, or stronger for an equal weight of metal:—

Held, that the patentee had merely transferred a known thing from one use to another, and an analogous use, and that what he claimed as his invention was not a good ground to sustain a patent. — *Id.*

PAYMENT IN EXCESS. See FUND.

PAYMENT. See MORTGAGE. RECEIVER.

POOR RATE.

The Crown not being named in the 43 Eliz. c. 2, is not bound by its enactments. Property therefore in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor. — *Mersey Docks v. Cameron*, 443; *Jones v. Mersey Docks*, 443.

The statute is, in its provisions, general and inclusive, and no other princi-

ple applying to create an exemption from those provisions, all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works. — *Id.*

Trustees who were constituted by Acts of Parliament, "The Mersey Docks Board," and were specially appointed to have the control of certain docks, &c. vested in them as such trustees, in order to maintain these docks for the benefit of the shipping frequenting the port of Liverpool, were therefore held liable to be rated as occupiers, though they occupied such docks, &c. only for the purposes of these Acts and derived no benefit from the occupation. — *Id.*

The King v. The Commissioners of the Salter's Load Sluice, 4 T. R. 730; and *The King v. Liverpool*, 7 B. & C. 61, overruled. — *Id.*

Recent Acts expressly declared that certain warehouses and parts of the docks, then for the first time erected and put under the * con- * 752
trol of the trustees, were to be liable to rates. — *Id.*

Per LORD CHELMSFORD. — These Acts did not by implication declare that the other parts of the docks were not liable to rates. — *Id.*

POWER. See APPOINTMENT.

1. A power to be validly executed must be executed without any indirect object. The donee of the power must give the property, which is the subject of it, as property, to the person to whom he affects to give it. — *Portland, Duke of, v. Topham*, 32.

2. A. created a power to appoint a fund between two of his daughters, H. and M., or to appoint it to one, in exclusion of the other, and subject to such restrictions, &c. as the donee of the power (A.'s son) might think fit. The donee of the power executed a deed of appointment, which in form gave the whole of the fund to one of the sisters, H., but it was understood between the parties that H. was only to receive one moiety of the fund for her own use, and that she was to allow the other to accumulate, subject to some future arrangement, and in pursuance of this understanding H. gave her brokers directions to invest, in the name of the donee of the power, of another brother, and of herself, one half of the fund, and the interest thereon, to accumulate : —

Held, that this was, in equity, a fraudulent execution of the power, and that the deed of appointment was wholly void. — *Id.*

3. The power authorised the donee to execute an appointment with or without a power of revocation and new appointment. The deed of appointment did not reserve the right of revocation. The Lords while affirming the decree of the Court below, which declared the deed of appointment void, introduced into the order the words "without prejudice to any question as to any future exercise of the power of appointment," but refused to express any opinion whether any such future exercise of the power could be permitted. — *Id.*

4. A testator after making specific devises of his property, real and personal, thus provided for the disposal of his residuary estate: "As to all the residue, &c., not hereinbefore specifically bequeathed, I give, &c. to my executors, their heirs, &c. * upon the trusts following," to pay debts and legacies, to permit her nephew, H. B. C., to receive the rents for life, &c.; "after the death of my said nephew, provided he shall leave any child or children him surviving, &c., I direct that my executors shall stand seised of my said residuary estate, upon trust for such persons and for such ends and purposes as my said nephew shall, by his last will, direct, appoint, or devise, &c.; but if my said nephew shall die without leaving any child or children him surviving, &c., and my said nephew shall not, previous to his decease, make any such appointment as aforesaid, then my executors shall stand possessed of my said residuary estate, &c., upon trust for B., Y., and R., their heirs, &c." The nephew died without ever having had a child, leaving a will in which he recited his uncle's will, and, declaring himself thereby entitled to appoint, he appointed the residue to E. and J.:—

Held, affirming the decision of the Master of the Rolls, that the nephew never having had a child, the condition on which the power to appoint was founded had not occurred, and the power to appoint never came into existence; that the nephew's appointment was therefore invalid, and the residuary estate went, under the uncle's will, to B., Y., and R. — *Earle v. Barker*, 280.

PRACTICE. See JUDGMENT. POWER, 3. WINDING UP, 1.

Where by consent, on the trial of a petition for a divorce, a jury has been dispensed with, if a new trial should be ordered, the consent previously given would no longer be binding, and the petitioner might demand to have his case tried before a jury. Per LORD WENSLEYDALE. — *Gipps v. Gipps*, 1.

Where an advertisement or trade mark states that which is not true, it cannot be made the subject of protection by the Court of Chancery. — *Leather Cloth Company v. American Leather Cloth Company*, 523.

The Appeal Committee cannot decide what documents are, and what are not necessary to be printed in the appendix to a case. A question on this point, though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The House would not afterwards hear it discussed, and refused to make any order as to the costs of the appendix. — *Spread v. Morgan*, 588.

- * 754 * The decision below being reversed, and the cause remitted, the Court below was left to deal with the general question of costs. — *Id.*

PRESCRIPTION. See LIGHTS. NUISANCE.

PRIVACY. See LIGHTS.

Invasion of privacy by opening a window which overlooks another man's grounds is not recognised by law as a wrongful act. — *Tapling v. Jones*, 290.

PROPERTY. See POOR RATE. TRADE MARKS.

PROPERTY, TITLE TO. See GAME.

Title to property created merely by the act of reducing a thing into posses-

sion, necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property. — *Blades v. Higgs*, 621.

Game chased and killed on the land of A., is his property. — *Id.*

PUBLIC PROPERTY. See **DAMAGES.** **POOR RATE.**

The Statute 48 Eliz. c. 2, is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions, all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works. — *Mersey Docks v. Cameron*, *Gibbs v. Mersey Docks*, 443.

RATE. See **POOR RATE.**

REANNEXED MANOR LANDS. See **MANOR.**

RECEIVER. See **TRUST.**

Payment of interest on an Irish mortgage made by a receiver appointed under the 11 & 12 Geo. 3, c. 10 (Ir.), over the estate mortgaged is, within the terms of the 40th section of 3 & 4 Wm. 4, c. 27, payment by "an agent of the party liable." — *Chinnery v. Evans*, 115.

* The words in the 40th section "by the person by whom the same * 755 shall be payable, or his agent," apply equally to the making of a payment and the signing of an acknowledgment. — *Id.*

The appointment of a receiver in a suit puts an end to the power of a trustee appointed for the benefit of creditors, to collect the rents. — *McDonnell v. White*, 570.

The duty of a receiver appointed in a suit relates (by the law of Ireland) as well to the arrears due from the tenants at the time of his appointment as to those which would afterwards become due, and in a case in which no steps were taken by the receiver to enforce payment from the trustee of arrears which he had suffered to accumulate, his estate could not, after the lapse of many years, be made liable for those arrears. — *Id.*

REDUCING INTO POSSESSION. See **GAME.**

REFUNDING. See **FUND.**

REGISTERED COMPANIES. See **COMPANIES.** **WINDING-UP.**

RESERVATION. See **POWER**, 1.

RESIDUARY LEGATEE. See **WILL**, 4.

REUNION OF MANOR LANDS. See **MANOR.**

REVOCATION. See **POWER.**

RIVERS. See **FISHERY.**

SEA, ARMS OF THE. See **FISHERY.**

SFPTENNIAL FINES. See **TENANTRY ACT.**

SHIFTING CLAUSE. See **WILL**, 3.

SHOOTING. See **GAME.**

SPIRIT LICENSE. See **EXCISE.**

STATUTES. See the following titles in the Index and pages in the volume.

- 48 Eliz. c. 2. Poor Law, 443.
- 21 James 1, c. 8. Patent, 223, 654.
- 11 & 12 Geo. 3, c. 10 (Ir.). Receiver, 115.
- 19 & 20 Geo. 3, c. 80 (Ir.). Irish Tenantry Act, 549.
- 6 Geo. 4, c. 81. Excise, 175.
- 2 & 3 Wm. 4, c. 71. Prescription. Window Lights, 290.
- 3 & 4 Wm. 4, c. 27. Receiver, 115.
- 5 & 6 Wm. 4, c. 83. Patent, 223.
- 6 & 7 Wm. 4, c. 38 (Ir.). Excise, 175.
- * 756 * 7 & 8 Vict. c. 110.
- 10 & 11 Vict. c. 78.
- 19 & 20 Vict. c. 47.
- 25 & 26 Vict. c. 89.
- 20 & 21 Vict. c. 85. Divorce, 1.
- 16 & 17 Vict. c. 51. Succession Duty, 257.

Companies Act, Winding-up Acts, 389.

SUCCESSION DUTY.

The value of property for the purposes of the succession duty, under the 16 & 17 Vict. c. 51, is to be ascertained at the time when the interest of the successor accrues. If the property has then no saleable value, nor any actual or potential annual value, it is not capable of being assessed. Neither possible increase nor diminution in the value of the property after the succession accrued was dealt with by the Legislature. — *The Attorney-General v. Sefton*, 257.

No system of assessment or charge can be adopted which draws into the calculation of value a prospective or future benefit. — *Id.*

When therefore A. succeeded to land which, as alleged by the successor, and admitted in the information, had not for some years before the predecessor's death produced any annual income, and did not produce any, annual or otherwise, to the successor, but of which he afterwards sold part, he was held not liable to duty under the provisions of the statute in respect of the part sold. — *Id.*

Per THE LORD CHANCELLOR (LORD WESTBURY). — *Semble.* That property (not specially exempted under the statute), which at the time of the accruer of the succession produces no annual income, but which is capable of being sold in the market, and would fetch a price there, can be assessed as upon an annual value, equal to interest at three per cent. on the price that might then be obtained for it. — *Id.*

Per LORD WENSLEYDALE. — "The beneficial enjoyment" mentioned in section 21 means no more than the enjoyment of the possessor in his own right, and for his own benefit, not as trustee for another. — *Id.*

Per LORD CHELMSFORD. — The 39th section applies only "when the value of a succession shall not be ascertainable under any of the preceding sections." — *Id.*

- * 757 Per LORD CHELMSFORD. — The word "first," in the 45th section, * applies only to such cases as those mentioned in the 23d, 24th, and 25th sections, with respect to timber, advowsons, and leases. — *Id.*

TENANTRY ACT.

Septennial fines only become payable under the 19 & 20 Geo. 3, c. 30 (The Irish Tenantry Act), where the nonpayment of a fine on the dropping of a life in a renewable lease is the fault of the tenant. The right to such septennial fines is given by the Act as a consequence of the tenant's neglect. — *Aldworth v. Allen*, 549.

Where such renewal fine, and the rent, &c. have been properly calculated, and the calculation transmitted to the landlord or his agent, and admitted to be correct, and an offer to pay the amount has been made, accompanied by a demand for a renewal, and the grant of the renewal has been postponed for the landlord's convenience, he cannot afterwards by imposing conditions and requiring proof of the tenant's title, open up the whole matter, and make the delay, which thenceforward occurs, the ground for demanding septennial fines, and rely on the refusal to pay them as a cause of forfeiture. — *Id.*

A. granted a lease for three lives renewable for ever. In 1844 two of the lives having dropped, the tenant sent in a demand for renewal, together with the calculation of rent, fines on the dropped lives, &c., and an offer to pay what was due. The account was acknowledged to be correct, but the renewal was put off on account of the landlord's absence from Ireland. In 1845 and 1846 a correspondence occurred between the agents, and on the part of the landlord the tenant was required, by a given day, to prove strictly his title to renewal, and also to pay all the renewal and septennial fines calculated up to that time. These last were demanded, under the statute, as a consequence of the nonpayment of the ordinary renewal fines when originally demanded. These conditions were not complied with, and some years afterwards a bill was filed to compel a renewal: —

Held, that the tenant was entitled to a decree for renewal without paying the statutory septennial fines. — *Id.*

TIME. See **CONDITION.** **SUCCESSION DUTY.**

Words in a will indicative of a class must be taken to denote the class as it was constituted at the date of the will, or at the death of the testator. — *Parker v. Tootal*, 143.

* Where, therefore, there was a gift (after the happening of certain * 758 events) amongst "my daughters and their children," the child of a daughter who had died before the date of the will was held not to be entitled to a share of the property thus devised. — *Id.*

The time for ascertaining the value of property for the purposes of the succession duty, is that at which by the death of the predecessor the interest of the successor first accrues. — *The Attorney-General v. Sefton*, 257.

TOLL. See **FISHERY.**

A liability to make compensation for actual injury done to an oyster bed situated in a navigable river, by anchoring thereon, is not to be confounded with a liability to toll for casting anchor in the soil itself. — *Gann v. The Free Fishers of Whitstable*, 192.

TRADE MARKS.

A company purchased all the property, utensils, good-will of business, and

trade marks, &c. of a manufacturer: this purchase would authorise the company, really carrying on business at the same place, to continue the use of the manufacturer's name and marks, so as to be protected therein against infringement of the same. — *Leather Cloth Company v. American Leather Cloth Company*, 528.

There may be a property in a trade mark which, on the sale of the right to manufacture the goods which it designates, may also be sold and transferred. *Semble*, a paper descriptive of a trade does not constitute a "trade mark." — *Id.*

Where an advertisement, or trade mark, states that which is not true, it cannot be made the subject of protection by the Court of Chancery. — *Id.*

Persons of the name of Crockett manufactured leather cloth, and put on it a stamp, describing it as manufactured by them at "New Jersey, U. S., and West Ham, Essex," and as being patented and being tanned. The appellants bought their manufactured articles, their materials for manufacture, good-will, and premises at West Ham, and their trade marks. *Semble*, that on such a purchase, the continued use by the purchasers of Crockett's original bill was not a fraud on their part, and if the use of it had been infringed, it might have been protected. — *Id.*

- * 759 But where in a stamp used by the defendants, the form of the * printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs', that any person with reasonable care and observation must see the difference, and could not be misled into taking the one for the other: —

Held, that there had been no infringement. — *Id.*

TRUST.

Quære. Whether an express devise to trustees in fee is cut down if the trust declared is not so extensive as the legal estate. — *Watkins v. Frederick*, 858.

Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is, that stale demands are not to be encouraged. — *McDonnell v. White*, 570.

In taking accounts against a trustee, when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognisant of all the matters connected with it. — *Id.*

A., being greatly in debt, executed a deed of trust for the benefit of creditors, and among the property assigned under the trust deed was a lease for lives renewable for ever, on which the rent reserved was really a high rack-rent; the tenant complained, and the trustee, with the knowledge of A., though without his consent, but with the full assent of A.'s brother, to whom A. had committed the management of his affairs, received from the tenant an abated rent; A. complained of the abatement, but he took no steps to put an end to it: —

Held, that the estate of the trustee could not, after the expiration of the trust, be called on to make up the deficiency. — *Id.*

While the trust was in existence, A., who had been absent from the country,

returned, was informed of all that had occurred, and made an affidavit in a suit then pending, which had been instituted by one of his creditors. In this suit a receiver was appointed over one of the estates included in the trust : —

Held, that from the date of this appointment the power of the trustee was at an end, and that, as by the law of Ireland, * the receiver's * 760 duty related as well to the arrears then due from the tenants of that estate, as to those which would afterwards become due, and consequently, no steps having been taken to enforce payment from the trustee of arrears which, before the appointment of the receiver, he had suffered to accrue, his estate could not, after the lapse of many years, be made liable for these arrears. — *Id.*

USAGE. See FISHERY.

VALUE OF PROPERTY. See SUCCESSION DUTY.

WILL. See APPOINTMENT. MANOR. TRUST.

1. A devise of a "manor" will not carry lands which had been part of the demesne lands of the manor, but had been severed from it, and were repurchased by the testator between the date of his will and his death. — *Delacherois v. Delacherois*, 62.
2. Implication may arise from an elliptical form of expression, which necessarily involves and implies something else, or from a form of gift which cannot be rendered effectual, or a direction to do something, which direction cannot be obeyed without implying something else. — *Parker v. Tootal*, 143.

Where, therefore, a will gave to T. an "estate for life, with remainder to the first son of the body of T. lawfully begotten, severally and successively in tail male," the words "and other sons" were introduced in order to prevent the words "severally, &c.," from being in effect struck out of the will, and T. was held to take an estate tail by implication. — *Id.*

Words in a will indicative of a class must be taken to denote the class as it was constituted at the date of the will, or at the death of the testator. — *Id.*

Where, therefore, there was a gift (after the happening of certain events) amongst "my daughters and their children," the child of a daughter who had died before the date of the will was held not to be entitled to a share of the property. — *Id.*

A testator named Chorlton had two sons, Richard and James. Richard had a son, Thomas, and died. Some years afterwards James married; and just before the birth of James's son the testator made his will, and died about two months after the birth of this son. By his will the testator devised * "unto my grandson Thomas Chorlton, son of the late Rich- * 761 ard Chorlton, all that, &c., for his own use during his natural life, with remainder to the first son of the body of the said Thomas Chorlton lawfully begotten, severally and successively in tail male of the name of Chorlton; and for want of such lawful issue of that name, either by my said grandson Thomas Chorlton or my said son James Chorlton, then I give, &c. amongst my daughters and their children," &c. The grandson Thomas entered, and while in possession suffered a recovery; he survived both his uncle James and James's son : —

Held, that taking all the words of the gift together, there was, by implication, an estate tail in the grandson Thomas, and that the recovery barred all right of ultimate succession in the daughters. — *Id.*

3. A. so devised his estate of G. that no female issue of any son of B., his first devisee, could take or inherit. B. being himself possessed of another estate, C. H., and having succeeded to the G. estate, made a will by which he devised his original estate C. H. to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into possession of the estate devised by A.; but that "as often as such estate of A. should come to the possession of any of his (B.'s) sons or daughters, or any of their issue, that then the person next in remainder under the limitations in his (B.'s) will, should be entitled to the C. H. estate; and so from time to time, as often as the event might happen, in such manner and as if the person so becoming possessed of the G. estate had died, or was then dead, without issue":—

Held, that "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," and excluded them alone from taking under those limitations. The effect of the shifting clause was therefore simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder. — *Jellicoe v. Gardiner*, 323.

4. A testator devised all his manors, &c. "to my son for his natural
• 762 • life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve"—(this devise in trust was repeated whenever necessary)—"for the son or sons, daughter or daughters, the males taking first, of my said son till they attain the age of twenty-one years, or the days of their marriage, and no further; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heirs-esses." He empowered his son to give "any part or even the whole of these estates" to any or either of his sons, but not to the daughters, "as my said son may, from their conduct to him, their father, think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200*l.* chargeable on his landed property, "and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates," &c. "I will therefore that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, &c., "the estates being equally divided between them or their heirs"; and he gave the "estates and property to them through the said trustees," &c. whom he empowered to raise 10,000*l.* for the daughters, chargeable on all his estate:—

Held, that the son took only an estate for life; that the trustees took an

estate in fee in remainder expectant on the determination of the life estate of the son, and that on the son's death without issue the estates went over to the daughters, as tenants in common in tail. No gift in the will was void for uncertainty or remoteness. — *Watkins v. Frederick*, 358.

Quere. Whether an express devise to trustees in fee is cut down if the trust declared is not so extensive as the legal estate. — *Id.*

5. Where some subject matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety, expressly and definitely given, shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overruled by an apparently general devise. — *West v. Lawday*, 375.

A person was possessed under one and the same lease for lives * re- * 763 newable for ever, of lands denominated B., C., F., and G., all situated in the county of Kerry. He granted out the lands of G. for lives with a covenant for perpetual renewal, reserving thereout a perpetual fee-farm rent. Some years after this grant he made his will, which recited that he was possessed of a lease for lives, renewable for ever, of certain lands in the county of Kerry, "which said lands are denominated B., C., and F., all situated in the parish of, &c. in the county of Kerry." He directed that "the aforesaid lands" should be sold, and after payment of his debts be equally divided between J. W. and S. L. After giving several legacies, he made J. W. "residuary legatee of all my real and personal estate and effects":—

Held, reversing the decision of the Master of the Rolls and the Lords Justices of Appeal in Ireland, that the estate of G. did not pass under the general devise, but went to the residuary legatee. — *Id.*

WINDING UP. See COMPANIES.

Ordinarily speaking, it is not under the provisions of the 25 & 26 Vict. c. 89, § 199, a discretionary matter with the Court, when a debt, due by a registered company, has been established and remains unsatisfied, to refuse to the creditor an order for winding up the company. — *Bowes v. Hope Insurance Company*, 389.

But (per LORD CRANWORTH) it is possible that a case might occur in which the Court could refuse such an order. — *Id.*

H., an insurance company, registered under the "Joint Stock Companies Act, 1844," granted a policy on a life. H. transferred its business and its liabilities to another company, M. The life fell; an action was brought against the H. Company. Several pleas were pleaded; a director and agent of the M. Company entered into a negotiation with the plaintiff and got the policy transferred to himself; the pleas were then withdrawn, and judgment entered against the H. Company. The director then assigned the policy and judgment to B. as trustee for another person. Execution was issued, and a return of *nulla bona* made. B. then presented a petition for a winding-up order against the H. Company. The Master of the Rolls granted the order. The Lords Justices offered to B. the opportunity of going into evidence in support of his claim, which was impeached

- * 764 by the H. Company to be collusive; but he * refused to do so, insisting that that company could not impeach it except by filing a bill to stay the judgment. On this refusal the Lords Justices discharged the order of the Master of the Rolls: —

Held, that the order of the Master of the Rolls could not be sustained, the H. Company being entitled to file a bill to impeach the judgment. But the petitioner was not bound, as a preliminary to his right to the order, to go into further evidence in support of his claim, for, there being a judgment in his favour, the burden of impeaching it lay on the company. The order of the Lords Justices was therefore reversed, and the petition was ordered to stand over until a fixed day, on the respondents undertaking to file a bill to impeach the judgment. — *Id.*

The costs of the appeals to the Lords Justices and to the House were ordered to be costs in the cause. — *Id.*

WINDOWS. See LIGHTS.

WORDS.

- "Accessory." — *Gipps v. Gipps*, 1.
- "Adultery." — *Gipps v. Gipps*, 1.
- "Agent." — *Chinnery v. Evans*, 115.
- "Beneficial Enjoyment." — *The Attorney-General v. Sefton*, 257.
- "Conniving." — *Gipps v. Gipps*, 1.
- "Convenient." — *St. Helen's Company v. Tipping*, 642.
- "Equally and in Common." — *Watkins v. Frederick*, 358.
- "Extend." — *Ralston v. Smith*, 223.
- "Forthwith." — *Roberts v. Brett*, 339.
- "First." — *The Attorney-General v. Sefton*, 257.
- "First Son severally and successively." — *Parker v. Tootal*, 143.
- "Inherit." — *Watkins v. Frederick*, 358.
- "Issue." — *Jellicoe v. Gardiner*, 323.
- "Manor." — *Delacherois v. Delacherois*, 62.
- "New Manufacture." — *Ralston v. Smith*, 223.
- "Occupation." — *Mersey Docks v. Cameron*, 443.
- "Obstruct new lights." — *Tapling v. Jones*, 290.
- "Person by whom Payable." — *Chinnery v. Evans*, 115.
- "Registered Companies." — *Bowes v. Hope Insurance Company*, 389.
- "Severally and successively." — *Parker v. Tootal*, 143.

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